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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *et al.*,
Respondents,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, *et al.*,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state law mandating that an employer, who enters into a private contract to perform services, must hire the employees of the predecessor contractor, is preempted by the National Labor Relations Act because it imposes collective bargaining obligations on the employer and abrogates the employer's right to make hiring decisions.

2. Whether the court of appeals has the authority to rewrite a state law to exclude coverage of supervisors as defined by the National Labor Relations Act in order to save the law from constitutional attack.

3. Whether a state law that specifies the individuals which a private employer must hire violates the Contracts Clause of the United States Constitution.

PARTIES

The parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit were the Washington Service Contractors Coalition, an unincorporated association; Cavalier Maintenance Service Inc., Colin Service Systems, Inc., Executive Building Maintenance, P&R Enterprises, Inc., Pioneer Building Services, Inc., Potomac Building Maintenance Co., Red Coats, Inc., and USSI, appellees below (Petitioners herein); and the District of Columbia, appellant below; and the Service Employees International Union, and the Service Employees International Union, Local 82, Intervenors/appellants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Washington Service Contractors Coalition, *et al.*, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The May 12, 1995 opinion of the United States Court of Appeals for the District of Columbia Circuit is reproduced herein as Appendix A and is reported at 54 F.3d 811 (D.C. Cir. 1995). The July 11, 1994 opinion of the United States District Court for the District of Columbia is reproduced herein as Appendix B and is reported at

858 F. Supp. 1219 (D.D.C. 1994). On August 9, 1995, the United States Court of Appeals denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix C).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on May 12, 1995 (App. A). The Court of Appeals denied rehearing and rehearing en banc on August 9, 1995 (App. C). In response to Petitioner's application, on October 17, 1995, Chief Justice Rehnquist extended the time for filing a petition for certiorari to and including December 7, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Supremacy Clause of the United States Constitution, art. VI, cl. 2:

> This Constitution, and the Laws of the United States . . . shall be the supreme law of the land

Article I, § 10 of the United States Constitution:

> [n]o state shall . . . pass any . . . Law impairing the obligation of Contracts.

The National Labor Relations Act, 29 U.S.C. §§ 151-169.

The District of Columbia Displaced Workers Protection Act, D.C. Code, §§ 36-1501 to 1503, which is reproduced in its entirety at Appendix B, p. 19a.

STATEMENT OF THE CASE

This case presents the question of whether a state law requiring an employer to hire the employees of its predecessor, and thereby assume collective bargaining obligations, is preempted by federal labor law. On May 12,

1995, a divided panel of the District of Columbia Circuit held that the District of Columbia Displaced Workers Act of 1994, D.C. Code §§ 36-1501 to 1503 (the "DWPA"), does not conflict with the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-169 ("NLRA"), nor with federal labor policy in general. The DWPA compels certain employers entering into private service contracts [1] to hire employees who worked for the predecessor contractor. As a result of this hiring requirement, this law imposes on employers an obligation to bargain with the labor union that represented the predecessor's employees, and it deprives employers of the right to set initial terms and conditions of employment. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). Despite this statute's infringement on an employer's right to hire and its creation of unprecedented collective bargaining obligations, the Court of Appeals held that the DWPA could be reconciled with the NLRA.

The panel's ratification of the DWPA's trespass into federal labor policy places this decision squarely in conflict with decisions of the Supreme Court, which hold that a successor's bargaining obligations are justifiable only where "the new employer makes a *conscious* decision to maintain generally the same business and to hire a majority of its employees from the predecessor." *Fall River Dyeing*, 482 U.S. at 41 (emphasis added). Because the DWPA imposes bargaining obligations, it impermissibly intrudes into the collective bargaining process under the Court's preemption doctrine, articulated in *International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 147 (1976) ("*Machinists*" preemption).

Despite the Supreme Court's express recognition of an employer's "right not to hire" a predecessor's employees

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[1] To provide food, janitorial or building maintenance, or health care services. DWPA § 2.

in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 (1974), the panel majority ruled that "the DWPA . . . would not require the employer to do anything that it has a right under the NLRA to refuse." App. 10a. The Supreme Court has long acknowledged that the NLRA is predicated on a careful balancing of employee *and* employer rights. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). The panel majority's narrow interpretation of the scope of NLRA preemption, and its refusal to acknowledge management prerogatives embedded within the NLRA, threatens this delicate balance and defies binding Supreme Court decisions.

Moreover, the Court of Appeals improperly acted as a legislature to save the DWPA from yet another defect. The DWPA requires contractors to hire both nonsupervisory and supervisory employees of the predecessor. The panel majority's order to modify the DWPA to exclude supervisors as defined by the NLRA represents judicial legislation contrary to the Supreme Court's maxim that courts are not to save a statute from constitutional attack by judicially rewriting it. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964).

Finally, the DWPA's requirement that private employers enter into employment contracts with specific workers, who have been designated by the District of Columbia, violates the Contracts Clause of the United States Constitution. It forces employers to enter into employment contracts with workers from other companies, rather than rely on their own trained and loyal employees.

This matter arises out of a complaint for injunctive and declaratory relief filed by the Washington Service Contractors Coalition and seven building service companies (hereinafter "Petitioners") on May 24, 1994. Petitioners sought an order preventing the District of Co-

lumbia (hereinafter "the District')[2] from enforcing the DWPA. The DWPA requires employers, who "successfully bid on a contract previously held by a competitor," (App. 13a) to "retain," *i.e., hire,* the previous contractor's employees, including supervisors. Under the law, contractors may not terminate these DWPA hires for 90 days except for "cause." After 90 days, the DWPA requires the contractor to perform a written evaluation of the "retained" employees and offer them continued employment if their performance has been "satisfactory." *Id.* In short, the DWPA requires that contractors hire unknown and unwanted individuals solely because these persons previously worked for the contractors' competitors. As a result of hiring largely from their predecessor's workforce and maintaining a continuity of operations under a given contract, these contractors are generally "successors" under the NLRA, with a duty to bargain with the union who represented the precedessor's employees.

The district court granted Petitioners' motion for summary judgment, finding that the NLRA preempts DWPA, and permanently enjoining the District from enforcing the Act. *Washington Service Contractors Coalition v. District of Columbia,* App. B. Further, the district court held that, by dictating a new employer's hiring decisions, the DWPA regulates an area of conduct that Congress intended to leave unregulated and open to the free play of economic forces. The court also held, and the dissent below agreed, that the DWPA "significantly alters the balance of power between labor and management" by imposing collective bargaining obligations where they would not otherwise arise. App. 35a, 17a.

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[2] On June 7, 1994, the district court granted a motion to intervene filed by the Service Employees International Union and the Service Employees International Union, Local 82 (hereinafter "SEIU").

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING ON PREEMPTION CONFLICTS WITH THE SUPREMACY CLAUSE OF THE CONSTITUTION, DECISIONS OF THIS COURT AND OTHER CIRCUITS, AND, IF LEFT UNDISTURBED, WILL HAVE A SUBSTANTIAL IMPACT ON FEDERAL LABOR POLICY.

Preemption of state law is grounded in the Supremacy Clause of the United States Constitution. Art. VI, cl. 2. Although the NLRA contains no express preemption provision, this Court has, since the early days of the NLRA, struck down state laws that conflict with the statute, frustrate the federal scheme or intrude into areas that have been left under the NLRA to the free play of economic forces. *See Machinists v. Wisconsin Employment Relations Comm'n*, 437 U.S. 132 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). The panel majority's conclusion that the DWPA is not preempted by the NLRA conflicts both with this Court's preemption doctrine enunciated in *Machinists* and, in principle, with the decisions of several circuit courts of appeals. No direct conflict with other circuits on the precise issue of preemption of state-mandated hiring laws exists because no other state or local jurisdiction has ever passed a law like the DWPA—a law which imposes on employers a virtually unconditional obligation to hire certain designated persons [3] strictly because of their prior association with another employer. *Washington Service Contractors*, App. 34a, n. 17.

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[3] In fairness, the statute at issue in *Cannon v. Edgar*, 33 F.3d 880 (7th Cir. 1994), could be said to compel the designation of a group of individuals to be used by an association of employers. The statute required cemeteries and unions to designate a pool of workers to perform interments during work stoppages. *Id.* at 881-82. The gravediggers union, SEIU Local 106, brought suit. The Seventh Circuit found the statute "invasive" and preempted by the NLRA under *Machinists*. *Id.* at 885.

A. The National Labor Relations Act Preempts the District of Columbia Displaced Workers Protection Act Because It Alters the Balance of Power Between Labor and Management Which Congress Struck in Passing the NLRA.

Under the NLRA, a "successor" employer is required to bargain with the labor union that represented the predecessor company's employees. Whether an employer is deemed a successor depends primarily on two conditions: a majority of the employees must have worked for the predecessor employer, and there must be continuity of operations. *Fall River Dyeing*, 482 U.S. at 41-43; *Burns Int'l Security Services, Inc.*, 406 U.S. at 281. The Board, which has the exclusive jurisdiction to make the sucessorship determination, has, for twenty years, made it clear that the primary factor in determining successorship is whether the new company hires a majority of its predecessor's employees, the so called "majority test." *Id.* Under this well-settled law, where a service contractor assumes a contract to perform janitorial work at a building with little or no break in operations and provides essentially the same services, the contractor will almost always be a "successor" if the contractor must hire the predecessor's employees. If a labor union represented the predecessor's employees, then the new contractor would incur—as a result of the DWPA's mandate to hire the predecessor's employees—an obligation to bargain with that labor union.[4] The DWPA forces private employers to hire employees they do not wish to hire and, as a direct result of that compulsion, saddles employers with collective bargaining obligations. If the DWPA is allowed to stand, the balance of power between union and management so carefully crafted by twenty years of federal labor law will be altered beyond recognition.

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[4] The only exception to a contractor's duty to bargain under the conditions imposed by the DWPA is where the bargaining unit at a particular site is not an appropriate one. *See P.S. Elliott Services, Inc.*, 300 N.L.R.B. 1161 (1990).

The majority's conclusion that the NLRA does not preempt the DWPA because it "does not require the employer to do anything that it has a right under the NLRA to refuse" (App. 10a), to do "oversimplifies *Machinists* preemption and takes a myopic view of the effects of the DWPA." *Washington Service Contractors,* App. 34a. Typically, *Machinists* preemption deals with state or local laws which provide an advantage to either labor or management in a way that upsets the balance of forces established by the NLRA. For example, in *Rum Creek Coal Sales v. Caperton,* 971 F.2d 1148 (4th Cir. 1992), the Fourth Circuit held preempted a West Virginia statute providing that no police officer would "aid or assist" a party in a labor dispute. As enforced by the state, the statute prevented the police from ejecting trespassing strikers from an employer's private property. Such inaction "provided the strikers with extended and unjustified economic power at the expense of the" employer. *Id.* at 1154. The panel's holding that the application of the successorship doctrine to DWPA mandated hires "is not in preemptive conflict within the ambit of *Machinists*" (App. 9a), conflicts in principle, with the Fourth Circuit's decision in Rum Creek Coal.

Machinists preemption is applicable even when there is no outright mandate or prohibition of employer, union, or employee activity, but only a burdening of that activity. Preemption analysis, turns on a regulation's "real effect on federal rights." *Livadas v. Bradshaw,* 114 S.Ct. 2068, 2076 (1994). There can be no dispute that the DWPA has a substantial effect on contractors' federal rights. Even the District and the SEIU grudgingly and euphemistically conceded in their brief below that "the DWPA may in some situations set the stage for the NLRB to require the employer to bargain." Successorship rules are clear; absent the *P.S. Elliott* defense, *supra* note 4, once a new contractor hires the predecessor's union-represented employees as a result of the DWPA, "then he would have

to recognize and bargain with the union." (Statement of Orrin Baird, Esq., counsel for intervenor SEIU at oral argument before the district court). Contrary to the panel's holding, the DWPA does require the employer to do something it has a right under the NLRA to refuse to do: Without the DWPA the employer has the right not to hire its predecessor's employees and the concomitant right not to bargain with a union which may have represented those employees. The "real effect" of the DWPA on federal labor policy is immediate and unmistakable.

In its focus on the fact that the NLRA does not permit employers to refuse to hire employees based on union membership or to recognize a union approved by a majority of the employer's employees (App. 10a), the panel's opinion skirts the crucial issue of whether DWPA's requirement that a contractor hire its predecessor's employees implicates collective bargaining obligations, the obligation to recognize a union or an employer's freedom to set initial terms and conditions of employment. What the panel's decision camouflages in its effort to understate the true impact of the DWPA on labor relations and collective bargaining is that the law of successorship is so well settled that, absent an argument that a building is not an appropriate bargaining unit, a contractor performing the same or similar services as a predecessor who hires a majority of the predecessor's employees will, not may, but will, be deemed a successor under the NLRA with a duty to engage in collective bargaining with any union who represented the predecessor's employees. Moreover, as the district court found, "the DWPA's effect will become even greater in some situations because the duty to bargain will arise immediately, precluding an employer from even setting the initial terms and conditions of employment. Such effect[] interfere[s] significantly with the traditional collective bargaining positions of labor and management." App. 35a.

The majority ignores the undeniable fact that the struggle for unions to secure and maintain recognition rights is an ongoing and, at times, adversarial one. In order to ensure that neither side has an inordinate advantage over the other, Congress has struck a balance between employers and unions. One need only look at the number of cases brought before the NLRB in the recognition context, to realize that the battle over recognition and the duty to bargain is far from over. *See e.g.* Hardin, *The Developing Labor Law* 118-38 (3d ed. 1990-92 Supp.) and cases cited therein. The DWPA not only upsets this balance by enhancing unions' organization efforts in this context; it relieves them "of the time and expense ordinarily related to seeking recognition and bargaining rights." App. 36a.

Notwithstanding the majority's willingness to obscure the direct impact of this law on collective bargaining, the DWPA fundamentally alters the balance of power between management and unions at buildings where the employees are represented by a union. Without the DWPA, employers have no duty to hire a majority of their predecessor's employees and no accompanying duty to bargain. Under the DWPA, unless the Board decides to make an exception [5] for employers and employees in the District engaged in janitorial work, the duty to bargain arises the

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[5] To do so would be in direct conflict with the Supreme Court's mandate that there be a uniform body of federal labor law, one of the underpinnings of federal labor policy and the preemption doctrine. *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). The entire principle of preemption operates to avoid conflicting rules of law and to provide for uniformity and stability in resolution of labor relations conflicts. *Id.* at 286. In enacting the NLRA, Congress intended to "replace inconsistent state laws with a uniform national labor policy." *S. Rep. No. 573, 74th Cong., 1st Sess.* 15 (1935), cited in *Moore v. General Motors Corp.*, 739 F.2d 311, 315 n.6 (8th Cir. 1984). Exceptions based on novel state laws are "precisely the harms that the preemption doctrine is designed to avoid." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 529 n.15 (1979).

instant the contractor hires the employees the DWPA requires it to hire, if not as soon as the contractor is awarded a new contract. Federal law does not allow a state, in concert with organized labor, to so alter the labor relations playing field. It is naive in the extreme to suggest that by effectively imposing bargaining obligations on contractors, and depriving them of their right to set initial terms and conditions of employment, the DWPA does not intrude into and burden the collective bargaining process, *see Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), and upset the delicate balance between unions and management Congress struck in the NLRA. As the district court correctly found:

> The DWPA upsets this balance by placing nonunion companies in positions where they will be required to recognize unions when they take over contracts from predecessors with unionized workforces. This puts employers in a worse position than they would be in the free market as envisioned by the NLRA. It also serves to put unions in a better position by relieving them of the time and expense ordinarily related to seeking recognition and bargaining rights. Once a union gains a foothold in a particular site, the DWPA effectively serves to keep that site unionized, regardless of what company takes over the contract at that site. This is not consistent with the NLRA.

App. 36a.

If "there is an imbalance in economic weaponry, it is not a regional problem to be addresed in whatever manner, or not at all, as each state sees fit; it is a national problem which requires uniform treatment by Congress." *Employers Ass'n v. United Steelworkers*, 32 F.3d 1297, 1301 (8th Cir. 1994) (quoting *Midwest Motor Express v. International Bhd of Teamsters, Local 120*, 512 N.W. 2d 881, 890 (Minn. 1994)) (striking down Minnesota's striker replacement law). Likewise, if the traditional

means of securing representation and bargaining rights are no longer satisfactory, it is not for the District of Columbia to attempt to remedy the deficiency by "relieving [unions] of the time and expense ordinarily related to seking recognition and bargaining rights" and "entrench-[ing] unions at particular sites." *Washington Service Contractors*, App. 36a.

Collective bargaining implications are so inextricably intertwined with the DWPA and so fundamental to the reason for its passage, the majority's disregard of these implications cannot be left undisturbed. As federal labor policy now dictates, the NLRA imposes a duty to bargain if a union represents a majority of the employees in an appropriate bargaining unit—a duty which now is imposed in virtually every unionized building in the District of Columbia, by operation of the DWPA.

The panel majority, through Procrustean logic, attempts to circumvent this conclusion by suggesting that the Board may abandon twenty years of established precedent to accommodate the District's novel and unprecedented intrusion into an employer's choice in selecting its employees. The panel held that "where the employer has been required by local law to hire a majority of its predecessors' employees," the Board "may or may not impose succesorship obligations on the new employer." Perhaps in recognition that for the NLRB to depart from twenty years of precedents would violate the fundamental notion of a uniform federal labor policy, the panel also held that, if the NLRB does impose such an obligation, there can be no conflict because the NLRB's decision would indicate that enforcing the "successorship requirement in the context of DWPA hires would be congruent with the aims of the NLRA." App. at 9a. This circular reasoning is fundamentally flawed. A review of the Supreme Court's development of the successorship doctrine reveals that the DWPA inevitably interferes with or prejudices either employers' or employees' NLRA rights.

The NLRA allows employees to choose to be represented by a labor organization for purposes of collective bargaining. In enforcing the NLRA, the Board makes the assumption that a change of employers does not necessarily alter the employees' desire to be represented by their union. See *Burns Int'l Security Services*, 406 U.S. at 278-79. Although Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right "to refrain" from collective bargaining, the problem of imposing the bargaining representative on the newly hired employees is arguably resolved if most of the new employer's employees worked for the predecessor. In that case, requiring the new employer to bargain with the union chosen by the predecessor's employees presumably honors the choice of the majority.

But in addition to recognizing the importance of safeguarding employee rights, the Supreme Court recognizes the rightful prerogative of employers to manage their businesses. The Court has made it clear that employers cannot be *forced* to hire their predecessor's employees. *Burns Int'l Security Services*, 406 U.S. at 280 n.5. The successorship doctrine is justifiable in the context of federal labor policy because to a substantial extent the "applicability of [successorship rules] rests in the hands of the successor." *Fall River Dyeing*, 482 U.S. at 40-41. There is no infringement of an employer's fundamental prerogatives, and of the delicate balance between labor and management mediated by the NLRA, to hold a new employer to a bargaining obligation when "the new employer makes a *conscious* decision to maintain generally the same business and to hire a majority of its employees from the predecessor." *Id.* at 41 (emphasis added).

The DWPA cannot be enforced without destroying this balance between employer and employee rights. The majority's speculation that the Board "may" not apply its successorship rules despite majority status when the state controls the hiring process ignores the harmful impact

such a reversal of long standing Board law would have on *employees'* rights: The employees would be deprived of their chosen collective bargaining representative, a result inimical to established federal labor policy. By the same token, imposition of a bargaining obligation on an employer compelled to take on DWPA hires would *not* establish that the Board finds such a result "congruent with the aims of the NLRA" (App. 9a), but only that the Board had reluctantly chosen one horn of an inescapable dilemma. Moreover, to do so would conflict with this Court's carefully crafted successorship policy, which recognizes the propriety of imposing bargaining obligations only when the employer makes an uncoerced decision to hire its predecessor's employees. *Fall River Dyeing*, 482 U.S. at 40-41. Application of the DWPA will necessarily injure the NLRA rights either of the employees or the new contractor. Accordingly, the only proper conclusion is that the NLRA preempts the DWPA, as the two statutes "cannot 'move freely within the orbits of their respective purposes without impinging upon one another.' " *Hill v. Florida*, 325 U.S. 538, 543 (1945) (quoting *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207 (1944)).

As the dissent aptly noted below, the district court's opinion, not the majority's, "reflects the proper preemption analysis under federal labor law."

> The majority's refusal to find preemption in the present context based upon its determination that the NLRB could apply its successorship doctrine to DWPA hires in a fashion that would avoid conflict seems to me to reverse the Supreme Court's *Garmon/Lockridge* analysis and undertake the case-by-case approach rejected by the Supreme Court in that decision.

App. 15a.

The majority not only "reverses" the Supreme Court's *Garmon/Lockridge* analysis, it misapplies the preemption

doctrine articulated by the Supreme Court in *Machinists*. The panel states that *Machinists* preemption protects from interference only a narrow class of "bargaining tactics implicitly left open to employers or employees" or "laws that disturb the labor dispute resolution system established by the NLRA." App. 9a, 10a.

The panel majority has narrowed beyond recognition the reach of *Machinists* preemption. Preemption analysis does not depend on the cosmetic labeling provided a statute or ordinance by a state or municipality. The key criterion for determining whether a state statute falls within the scope of *Machinists* is not whether the statute forbids employers or unions from utilizing certain bargaining tactics, but whether the statute "encourage[s] or discourage[s] . . . collective bargaining processes." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). *Accord Livadas v. Bradshaw*, 114 S. Ct. at 2075. In *Garner v. Teamsters Union*, 346 U.S. 485 (1953), the Court considered whether the NLRA preempted state power to restrict recognitional picketing, *i.e.*, picketing aimed at forcing an employer to enter into a collective bargaining relationship. By definition, such picketing is *not* utilized during the collective bargaining process and is neither a "bargaining tactic" nor part of "the labor dispute resolution system established by the NLRA." Nonetheless, the Supreme Court concluded that the NLRA preempted state regulation of this activity which might have resulted in, but was independent of, collective bargaining obligations. *Id.* at 499-500. The DWPA, like the statute in *Garner*, regulates activity which may result in collective bargaining obligations. The majority's view that this type of state regulation is outside the scope of the Supreme Court's preemption doctrine is in error.

Concededly, decisions relying on *Machinists* preemption have often involved state interference with union or employer conduct that might loosely be characterized as

a "bargaining tactic."[6] *See, e.g., Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986). Even in these cases, however, the courts have made it abundantly clear that "bargaining tactics" are but a subset of the " 'power of management and labor to further their respective interests' " that the NLRA deliberately left " 'uncontrolled.' " *Id.* at 614 (quoting *Machinists*, 427 U.S. at 146, quoting *Teamsters v. Morton*, 377 U.S. 252, 258-59 (1964)). The fact that many *Machinists* preemption cases involve interference with "bargaining tactics" proves only that most states have not had the temerity to offer to unions a state-mandated route to recognition and collective bargaining rights while interfering with so funda-

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[6] The DWPA does, in fact, implicate "bargaining tactics" as well as recognitional and collective bargaining rights and obligations. In some instances under the DWPA, "the duty to bargain will arise immediately, precluding an employer from even setting the initial terms and conditions of employment." *Washington Service Contractors*, App. 35a. Usually, a successor is free to set initial terms and conditions of employment. *Burns Int'l Security Services*, 406 U.S. at 294-95. However, where it is "perfectly clear that the new employer plans to retain all of the employees in the unit," the employer must bargain with the employee's representative over initial terms and conditions, and cannot unilaterally change the wages and working conditions set by the predecessor. *Id.* The NLRB recently applied the "perfectly clear" caveat to find that a successor service contractor violated the NLRA by unilaterally setting initial wage rates which were lower than the predecessor's. *Canteen Co.*, 317 N.L.R.B. No. 153 (June 30, 1995). In *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965), the Court "made it clear that an employer's right to 'institute unilaterally the working conditions which he desires' is among the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining.' " *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 (D.C. Cir. 1995). While *American Ship Bldg.* and *Brown* involved an employer's right to make unilateral changes in wages and working conditions after contract expiration, the "tactic" is no less important before initial contract negotiations. The panel majority in the case below chose to ignore the fact that the DWPA eviscerates this recognized and protected management bargaining tactic.

mental an employer right as the right to chose its own employees.

"[T]o accommodate federal labor policy, we must preserve the delicate balance of countervailing power that characterizes the process." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1052 (D.C. Cir. 1995). This the DWPA fails to do, and thus, if this law, and the majority's opinion, is allowed to stand, its implications go far beyond the small janitorial cleaning companies who are Petitioners in the instant case. It means that in any jurisdiction where unions have been unsuccessful in using traditional methods of organizing workers, but are more successful with local politicians, unions can achieve through the back door that which they have been unable to achieve under the NLRA or through Congressional action—they have rewritten federal labor policy so that it now "favors unions." *Id.*

B. By Abrogating An Employer's Hiring Freedom, The DWPA Intrudes Into An Area That Congress Intentionally Left Unregulated.

The majority's inability to see any "freedom implicitly left to employers by the NLRA" which the DWPA compromises is directly contrary to Supreme Court decisions on successorship and preemption. The panel fails to acknowledge that the NLRA creates "rights in labor *and management* both against one another and against the State." *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 109 (1989) (emphasis added). Some of these rights are implicit in the overall structure of the NLRA. *Id.* at 110. The NLRA does not explicitly establish the right of employers to hire permanent replacements, for example, but the Supreme Court has long recognized this right, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938), and a state statute which interferes with this right would be preempted. *Employer Ass'n v. United Steelworkers*, 32 F. 3d 1297 (8th Cir. 1994) (state law

prohibiting the hiring of permanent replacements is preempted by NLRA). As the Supreme Court recently observed in *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts*, 507 U.S. 218 (1993), "the NLRA prevents a State from regulating within . . . a zone protected and reserved for market freedom." A system imposed by a state or municipality in which businesses are assigned groups of unknown workers is antithetical to this federally-protected market freedom.

As the dissent in this case trenchantly observed, in all its successorship cases, the Supreme Court has recognized the right of the employer "not to hire any of the former [predecessor] employees, if it so desire[s]." App. 16a (quoting *Howard Johnson*, 417 U.S. at 262). *See also* App. 33a. The Supreme Court's explicit recognition of an employer's right "not to hire" a predecessor's employees contrasts sharply with the panel majority's conclusion that "the DWPA . . . would not require the employer to do anything that it has a right under the NLRA to refuse." App. 10a. A comparison of the Supreme Court's decision in *Howard Johnson* with the panel's opinion by itself demonstrates that the decision is in direct conflict with Supreme Court pronouncements.

A critical, indeed definitional, market freedom for an employer (*i.e.*, an entity that employs) is the freedom to make hiring decisions based on the employer's assessment of the qualifications of prospective employees. The district court accurately recognized that an employer's hiring decisions are an "important economic tool" because "the quality of an employer's workforce may affect the awarding of future contracts." "The DWPA strips [employers] of this legitimate and valuable economic tool while simultaneously adding to the [employers'] collective bargaining obligations." App. 37a, n. 21. By abrogating this right, the DWPA regulates employer conduct that Congress intentionally "left to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140.

It is no exaggeration to state that the Supreme Court would not have upheld the NLRA without concluding that the NLRA preserves "the normal exercise of the right of the employer to select its employees . . . ." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 45. Throughout the Supreme Court's development of the successorship doctrine, it has been sensitive to the need to reconcile "the protection afforded employee interests in a change of ownership . . . with the new employer's right to operate the enterprise with his own independent labor force." *Howard Johnson*, 417 U.S. at 264.

Indeed, the anti-discrimination provisions of the NLRA are unintelligible unless one assumes that employers retain the right to make merit-based selections. As the panel majority recognized, the NLRA expressly forbids employers from discriminating in their hiring decisions against pro-union advocates. App. 10a. But, employers cannot make discriminatory hiring decisions unless they have the power to make hiring decisions. Accordingly, the fact that the NLRA affirmatively prohibits an employer from refusing to hire employees on the basis of union membership does not mean that a state statute requiring an employer to hire certain individuals does not compromise a freedom implicitly left to employers—the freedom to make non-discriminatory, but merit based, hiring decisions.

The panel majority's niggardly interpretation of employer rights under the NLRA is also inconsistent with prior decisions of several courts of appeals, including, ironically, other panels of the District of Columbia Circuit. For example, in *Brown v. Pro Football, Inc.*, 50 F.3d at 1051-52, the District of Columbia Circuit recognized that employers, as well as labor unions and employees, have rights that are protected from interference by the NLRA. By contrast, the panel majority could not "imagine" what employer rights might be affected by the DWPA. App. 9a. Indeed, the author of the majority

opinion below (whose position represented the dissent in *Pro Football*) appears to disagree with the principle that "[u]nions are not the sole beneficiaries of the NLRA" and that "the NLRA is a carefully defined *bilateral* process." *Id.* at 1051 (emphasis in original). By the same token, in *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), the Ninth Circuit recently struck down a law requiring private employers on private construction projects to pay a prevailing wage set by the county because it interfered with the economic forces employers could employ in reaching agreements.

In the final analysis, the DWPA impermissibly hands a powerful organizing tool to unions in the District and imposes collective bargaining obligations on employers at the cost of an employer's right to select its employees. There should not be any doubt that the DWPA—a statute that effectively abrogates an employer's right to hire—is preempted by the NLRA.

C. The Panel's Holding That The DWPA Is A Minimum Labor Standard Conflicts With Decisions Of This Court And Other Circuits.

The panel majority justified its rejection of the preemption finding, not only by glossing over the conflict between the DWPA and the NLRA, but also by misdescribing the DWPA as a statute that merely establishes minimum labor standards for employees. App. 10a-11a. This characterization represented an attempt by the panel majority to shoehorn the DWPA into a category of state statutes that is not preempted by the NLRA.

The Supreme Court has ruled that state statutes establishing "minimum terms of employment," such as minimum wage or workers' compensation laws, are not preempted by the NLRA, as these statutes are "unrelated in any way to the processes of bargaining or self-organiza-

tion" and do not interfere with the federal labor scheme. *Metropolitan Life Ins. Co. v. Masachusetts*, 471 U.S. 724, 754, 756 (1985). *Accord Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-21 (1987). These statutes "neither encourage nor discourage . . . collective bargaining processes . . . [n]or do they have any but the most indirect effect on the right of self-organization." *Id.* at 755.

Petitioners assert, and the district court and the dissent below agreed, that a statute which requires the wholesale and indiscriminate hiring of a competitor's employees and results in the involuntary assumption of a collective bargaining obligation along with the competitor's wages and working conditions, is not the equivalent of a local regulation establishing minimum terms of employment along the lines of the state mandated health benefits in *Metropolitan Life Ins. Co.*, 471 U.S. at 754. Indeed, the DWPA is fundamentally different from a statute that merely establishes minimum terms and conditions of employment. The DWPA requires contractors to establish an employment relationship where none existed before. To conclude that the state can assign employees to an employer because states are free to set minimum terms of employment is tantamount to maintaining that the state's right to determine the conditions under which persons may marry encompasses the right to assign spouses or a state's right to establish conditions for election of public officials encompasses the right to compel those officials to hire the employees of the office holder they defeat.

Furthermore, this logical distinction is reflected in the differences in the empirical consequences between assigning employees and establishing certain standards of employment. Unlike fixing a minimum wage, requiring severance payments, mandating health benefits, etc., the assignment of a predecessor's employees to a new contractor manifestly "encourage[s] . . . collective bargaining processes" and directly effects "self-organization." *Cf.*

Metropolitan Life Ins. Co., 471 U.S. at 755. If the predecessor's employees were unionized, the new contractor now has a collective bargaining obligation that would not otherwise have existed and the contractor may be required to increase wages or adopt restrictive work rules of the predecessor. At the same time, the union is liberated from the burden of having to organize the new contractor's workforce.[7] In so doing, the DWPA has unmistakenly altered "the processes of bargaining [and] self-organization," *id.* at 756, that are protected from state interference by the NLRA.

The Ninth Circuit recently recognized the distinction between a minimum labor standard and "undue government interference with the collective bargaining processes protected by the NLRA" in *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497 (9th Cir. 1995). In a purported effort to protect the citizens of the County of Contra Costa, reduce pollution from accidents and protect the public health and welfare,[8] the county passed a requirement that private employers pay prevailing wages on private construction projects. The Ninth Circuit struck down the new statute, finding that a prevailing wage statute was not the equivalent of a minimum wage statute and was not a permissible minimum labor standard. *Id.* Like the *Bragdon* ordinance, the DWPA is "not the type of regulation of general application" upheld in *Metro-*

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[7] Local labor unions are, of course, ecstatic at the prospect of being relieved of this burden. The representatives of Intervenor SEIU Local 82 have complained about the difficulty of organizing janitorial employees, most of whom work at night, observing that "'[c]rawling around this city at 11 o'clock at night is not a fun job.'" *Custodians Union Readies Message for New D.C. Board, The Washington Post*, June 6, 1995 at D4.

[8] Like the DWPA, it has been suggested that the Contra Costa ordinance was actually motivated by the change "'in focus among labor organizations away from traditional labor unrest, toward alternative methodologies for increasing union membership.'" 473 CCH Insight, *Labor Law Reports*, No. 473 (September 1995).

politan Life. Id. Also, like the ordinance struck down in *Bragdon,* the public purpose justification for the DWPA is "tenuous," and the law "is more properly characterized as an example of 'an interest group deal in public-interest clothing.'"[9] *Id.* at 503 (quoting *National Solid Wastes Management Ass'n v. Killian,* 918 F.2d 671, 688 (7th Cir. 1990), *aff'd,* 505 U.S. 88 (1922)).

A requirement that an employer not discriminate on the basis of union activities in its hiring decisions differs *toto caelo* from a requirement that an employer hire a specific group of individuals—determined by the state—regardless of the employer's objective appraisal of their qualifications.[10] That a state has the authority to prevent individuals from discriminating against potential purchasers of their home on the basis of their race cannot be transformed, even by the most perverted distortion of logic, into an argument that the state has the authority to require those individuals to sell their home to the first person who appears at their door. Forbidding discrimination against a protected class with respect to distribution of a certain benefit is simply not equivalent to a mandate that the benefit be distributed to specific individuals. *See Heckler v. Matthews,* 465 U.S. 728, 739 (1984).

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[9] As in the Contra Costa ordinance, "it is difficult to see how the burden on public services by unemployed . . . workers would be, in any way, remedied." 64 F.3d at 503. The ostensible purpose of the DWPA—to reduce persons on the District's unemployment roles—cannot be accomplished by telling an employer whom to hire. The law does not create jobs or alter the number of unemployed persons. It simply alters the identity of the individuals who will be unemployed and who will have a job.

[10] As the district court sagely noted, "there are numerous legitimate and nondiscriminatory reasons why a successor may not want to hire its predecessors' employees. For example, an employer may choose not to hire a particular worker because of that individual's past attendance record, poor work quality, prior insubordination or for a myriad of other reasons. App. 37a, n.21.

Moreover, Congress' prohibition of discrimination by an employer against individual union supporters in hiring and firing decisions necessarily implies an intent to maintain the employer's traditional prerogative of selecting individuals to whom it will entrust its business "free of other methods and sources of restraint." In *Jones & Laughlin Steel Corp.*, the Supreme Court emphasized that the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or discharge them." 301 U.S. at 45-46. *Accord Intermountain Rural Electric Ass'n v. NLRB*, 732 F.2d 754, 760 n.8 (10th Cir.), *cert. denied*, 469 U.S. 932 (1984) (the NLRA "does not permit interference with the employer's normal exercise of its right to hire and fire employees").

In sum, the DWPA is unique; it is the only statute or regulation enacted by any state or locality that compels the hiring of a specific group of individuals. As the district court observed, "no jurisdiction has previously told a private employer via legislation that it must hire particular individuals regardless of the reasons why the employer may not wish to hire the individuals." App. 34a, n.17. The majority's equation of the DWPA to minimum labor standards legislation conflicts with this Court's precedent and the Ninth Circuit's decision in *Bragdon*.

II. THE COURT OF APPEALS' REWRITING OF THE DWPA TO ACCOMMODATE ITS UNCONSTITUTIONAL PROVISIONS VIOLATES THIS COURT'S PROSCRIPTION AGAINST JUDICIAL LEGISLATION.

In addition to its preemption finding under *Machinists*, the district court found that the DWPA conflicts with federal labor policy as enunciated in Section 14(a) of the NLRA, and thus is preempted under the principles set forth in *Garmon*, because the DWPA, as written, required contractors to hire the supervisors employed by the pre-

decessor. App. 30a-31a. The District of Columbia and the SEIU did not appeal this finding. The Court of Appeals ordered the district court to revise its injunction against enforcement of the DWPA and issue an order rewriting the DWPA to exclude that portion of the law which was preempted, *i.e.* in so far as the statute applied to supervisors as defined by the NLRA. App. 12a, n. 3. Since the DWPA does not mention supervisors, the Court of Appeals essentially ordered the district court to rewrite the exception provision[11] of the law to include a new category of person, NLRA statutory supervisors.[12]

As this Court made clear in *Aptheker v. Secretary of State*, 378 U.S. at 515-16, and recently reaffirmed in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), courts should not rewrite legislation so it will pass constitutional muster and must "strive to avoid" "tamper[ing] with the text of [a] sta-

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[11] The DWPA as originally drafted contained *inter alia* the following exceptions to its definition of covered employees: "except persons employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act (129 U.S.C. § 213(a)(1)) [sic]." It made no mention of supervisors.

[12] The impropriety of rewriting the DWPA in this manner is brought home by the preemption problems created by the revision. Under the rewritten statute, the Court of Appeals has left it to the Superior Court of the District of Columbia to determine whether a person not hired or discharged by a contractor is a statutory supervisor under the NLRA. In this analysis, the Superior Court will be required to decide issues which fall in an "area of federal labor law that has generated extensive litigation before the NLRB and is reserved for the NLRB to decide." *See Iron Workers v. Perko*, 373 U.S. 701, 706 (1963). The issue of supervisory status remains an "aging but persistently vexing problem." *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143, 145 (5th Cir. 1965); *see also NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994). As a result of the majority's decision, the DWPA improperly leaves this problem to the District of Columbia local courts. *See Washington Service Contractors*, App. 30a and n.14.

tute." *Id.* at 1019. In *National Treasury Employees Union,* the statute in question prohibited federal employees from accepting compensation for making speeches or writing articles. The statute was challenged on First Amendment grounds as an unconstitutional restriction on the speech of government employees. The District of Columbia Circuit held the statute invalid, but issued a remedy of "judicial severance" by striking " 'officer or employee' . . . *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees." *National Treasury Employees Union v. United States,* 990 F.2d 1271, 1279 (D.C. Cir. 1993). Recognizing the courts' "obligation to avoid judicial legislation," the Supreme Court reversed the D.C. Circuit insofar as its remedy required tampering with the statute. As the dissent in *Treasury Employees* had noted:

> Though severability may be achieved 'by striking out or disregarding words that are in the [challenged] section,' it may *not* be achieved 'by inserting [words] that are not now there.' "

Id. at 1295 (quoting *United States v. Reese,* 92 U.S. (2 Otto) 214, 221 (1875)) (emphasis in original).

What the panel below failed to "remember [is] that '[a]lthough the Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of '. . . judicially rewriting it." *Aptheker,* 378 U.S. at 515, citing *Scales v. United States,* 367 U.S. 203, 229-230 (1961). The Court of Appeals' decision rewriting the DWPA to insert the words, "except supervisors as defined by the NLRA," in order to make the law pass Constitutional muster ignored this Court's proscription against "judicial legislation" and must not be allowed to stand.

III. THE DWPA VIOLATES THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I, § 10 of the United States Constitution mandates that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." [13] The DWPA violates this restriction by compelling Petitioners to assume unwanted contract obligations by forcing them to hire the employees of the previous contractors, retain them for a period of 90 days, and if an employee's performance meets a minimum threshold of "satisfactory," offer continued employment. Imposition of such contract [14] obligations is unprecedented. In addition, in order to provide employment for the DWPA hires, Petitioners may not employ their own employees at DWPA sites, thus forcing an abrogation of their contractual relationships with their existing employees.

The Supreme Court has adopted a three-part test for determining whether a statute violates the Contracts Clause. A statute is unconstitutional if (1) it results in a substantial impairment of a contractual relationship; and (2) the impairment is not justified by a "significant and legitimate public purpose;" or, if so justified, (3) the impairment is not based upon reasonable conditions or " 'of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

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[13] This clause restricts the legislative power of the District of Columbia. D.C. Code § 1-204 ("the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States").

[14] An at-will employee is an employee under contract for an indefinite term. *Sorrells v. Garfinckel's*, 565 A.2d 285, 289 (D.C. 1989).

Application of this test to the DWPA immediately reveals the statute to be unconstitutional. The requirement that Petitioners hire and retain unknown and unwanted employees of other employers in lieu of their own trained employees poses a great burden on Petitioners. The panel found that this requirement is "not cognizable under the Contracts Clause." App. 12a. In so doing, the panel ignored this Court's ruling that laws increasing or creating contractual obligations are just as violative of the Contracts Clause as those laws that diminish or eliminate contractual obligations. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 n.16 (1978).

As to whether the DWPA's impairment on contracts is justified, the answer is a resounding "no." The DWPA is undeniably designed to "provid[e] a benefit to special interests," *Energy Reserves*, 459 U.S. at 412, *i.e.* unions attempting to organize the District's service workers, rather than being "enacted to protect a broad societal interest." *Allied Structural Steel*, 438 U.S. at 249. While, the stated purpose of the law is to reduce the number of District residents collecting unemployment compensation from the District, overall unemployment within the covered industries will *not* be reduced. For each person hired pursuant to the law, some other individual is left without employment. The number of unemployed persons remains unchanged. Thus, the broader problem of unemployment in the District of Columbia, the ostensible purpose of this law, remains untouched by this legislation. This result should not be surprising since the legislative history of the DWPA reveals that the underlying purpose for enacting the DWPA was to assist in the unionization of the covered industries and to prevent the replacement of union contractors with nonunion contractors. (Legislative History of DWPA, Testimony of Service Employees International Union, Local 82 and Testimony of Gene Thurber, President of Building Maintenance Associates). Such a narrow, political goal serves to undermine a

statute, such as the DWPA, that substantially impairs private contractual arrangements. *See Associated Builders & Contractors v. Baca.* 769 F. Supp. 1537, 1550-51 (N.D. Cal. 1991), *aff'd on other grounds, Chamber of Commerce of the United States v. Bragdon,* 54 F.3d 497 (9th Cir. 1995).

Furthermore, even if the purposes of the DWPA were accepted *arguendo* as legitimate, the means the DWPA has adopted to accomplish this end are impermisible. The DWPA does "not operate in an area already subject to state regulation . . . but [rather has] invaded an area never before subject to regulation by the State." *Allied Structural Steel,* 438 U.S. at 250. No jurisdiction in the history of the United States has ever directed private employers to hire certain specific individuals. App. 34a, n.17. Such a radical modification of an employer's ability to contract for labor cannot withstand constitutional scrutiny.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 27, 1995 Decided May 12, 1995

Nos. 94-7143 and 94-7144

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Appellees

v.

DISTRICT OF COLUMBIA, *et al.*, and
SERVICE EMPLOYEES INTERNATIONAL UNION and
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 82,
Appellants

Appeals from the United States District Court
for the District of Columbia

(94cv01127)

Before WALD, SENTELLE and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

WALD, *Circuit Judge*: The District of Columbia Displaced Workers Protection Act of 1994, 41 D.C. Reg. 1011 (to be codified at D.C. CODE ANN. §§ 36-1501 to 1504) ("DWPA" or "Act"), requires that contractors who take over contracts for the provision of certain services must hire their predecessors' employees for a period of 90 days. Appellees, a coalition of service contractors and

eight individual companies (collectively "the contractors"), brought suit in the district court alleging that the DWPA is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988) ("NLRA"), and violates the mandate of the Contracts Clause. U.S. CONST. art. I, § 10, cl. 1. The district court agreed that the NLRA preempts the DWPA and enjoined the Act's enforcement without addressing the Contracts Clause issue. The District of Columbia and its mayor ("the District") and the Service Employees International Union and its local branch ("SEIU") appeal. Because we hold that the DWPA is neither preempted by the NLRA nor invalid under the Contracts Clause, we vacate the district court's decision and remand for proceedings consistent with this opinion.

I. BACKGROUND

A. *The DWPA*

The DWPA was enacted by the Council of the District of Columbia and approved by Mayor Sharon Pratt Kelly on February 17, 1994. Following a period of congressional review, it became law on April 26, 1994. According to the District, the DWPA represents "an effort . . . to provide a measure of employment security to certain low wage service workers who are frequently displaced from their employment when their employers lose contracts," and to "reduc[e][] the number of unemployed D.C. residents currently collecting unemployment benefits." Appellants' Brief at 2-4.

The Act applies to contractors who employ 25 or more persons and perform food, janitorial, maintenance, or nonprofessional health care services. DWPA § 2(a). Such contractors must "retain, for a 90-day transition period, covered employees [1] who have been employed by the pre-

[1] The DWPA does not define "covered employees," but it does provide that "persons employed less than 15 hours per week and [] persons employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of

vious contractor for the preceding 8 months or longer at the site or sites covered by the contract." *Id.* at § 3 (b). During the transition period, the new contractor may dismiss "retained" employees—beginning with the least senior—in excess of the number that it "determines . . . are required to perform the new contract," *id.* at § 3(c); other covered employees, however, may be terminated only for "cause." *Id.* at § 3(e). The DWPA also requires that the new contractor "shall [at the end of the transition period] perform a written performance evaluation for each employee retained pursuant to this act"; if the employee's performance is found to be satisfactory, the contractor "shall offer the employee continued employment under the terms and conditions established by the new contractor." *Id.* at § 3(f). The DWPA provides employees discharged in violation of the Act a cause of action for back pay, costs, and attorney's fees in the Superior Court of the District of Columbia. *Id.* at § 4.

B. *Procedural Background*

On May 24, 1994, appellees filed a three-count complaint for declaratory and injunctive relief in the district court.[2] Appellees advanced three primary theories for the proposition that the DWPA was preempted by federal law, as well as a claim of unconstitutionality under the Contracts Clause.

First, appellees argued that the DWPA is preempted by § 14(a) of the NLRA. The district court agreed. Specifically, it found that the DWPA "conflicts with § 14(a) by . . . infring[ing] upon contractors' abilities to ensure the loyalty of their supervisors." *Washington Service Contractors Coalition v. District of Columbia*, 858 F.

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the Fair Labor Standards Act" are exempt from the Act's coverage. DWPA § 2(a).

[2] The complaint named the District as defendant. On June 7, 1994, the district court permitted SEIU to intervene as additional defendants.

Supp. 1219, 1225 (D.D.C. 1994). The court held that "the DWPA's application to supervisors must [accordingly] be enjoined." *Id.* at 1227.

Appellees also argued that the DWPA is preempted by federal law because it could transform some non-union contractors who "retain" union employees into "successor" employers under the NLRB's jurisprudence, and so oblige the new contractors to bargain with the union that represented their predecessors' employees. This, appellees claimed, represents an impermissible state incursion into the collective bargaining processes regulated by federal law. The district court again agreed. It held that "the DWPA's effect . . . on collective bargaining so significantly alters the balance of power between labor and management that this Court must find that the DWPA is preempted by the NLRA." *Id.* at 1229. The court therefore "enter[ed] a declaratory judgment . . . permanently enjoin[ing]" the Act's enforcement. *Id.* at 1230.

Appellees contended as well that the NLRA preempts the DWPA because it "improperly regulates [contractors'] right to hire whomever they wish." *Id.* at 1227. The district court wrote that "it is not clear whether this inhibition on free enterprise alone would be adequate to justify NLRA preemption," *id.* at 1229, but found it unnecessary to resolve the question in light of its other rulings in the case. The court also did not reach appellees' Contracts Clause claim.

The District and SEIU opted not to appeal the district court's ruling that § 14(a) of the NLRA preempts application of the DWPA to supervisors. Appellees argue that this appeal is therefore moot on the theory that the district court's unchallenged § 14(a) ruling, standing alone, is sufficient to justify the whole of its injunction on the application of the DWPA. In addition, appellees continue to maintain that the DWPA is preempted because of its potential interference with federal successorship doctrine and employers' hiring decisions, and that it is invalid under the Contracts Clause.

II. ANALYSIS

A. *Preemption Principles*

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, state law is preempted when Congress has acted to "occupy the field," *see, e.g., Fidelity Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). State law is not preempted, however, " 'unless that was the clear and manifest purpose of Congress.' " *See Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The courts have evolved two distinct preemption doctrines to guide this inquiry in the NLRA context. The first of these doctrines is "*Garmon* preemption," named for *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, a California court awarded damages against union members under state tort law for engaging in picketing that arguably was protected under § 7 of the NLRA, but which the employer said constituted an unfair labor practice under § 8. The court reasoned that because the National Labor Relations Board ("NLRB" or "Board") had declined to exercise jurisdiction over the case—due to its insufficient effect on interstate commerce—no conflict arose from California's exercise of authority. The Supreme Court disagreed, holding that "[w]hen a [labor practice] is arguably [protected or prohibited by §§ 7 or 8 of the NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Id.* at 245. State law is then preempted under *Garmon* when it conflicts with the "primary jurisdiction" of the NLRB to decide whether a certain labor practice is lawful under §§ 7 and 8 of the NLRA, regardless of whether the NLRB has opted to exercise its jurisdiction. *Id.*

The second preemption doctrine potentially relevant to this case is "*Machinists* preemption," named for *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1975). In *Machinists*, an employer filed a charge with the NLRB seeking a determination that union members' refusal to work overtime was an unfair labor practice. The NLRB found that the conduct did not violate any specific provision of the NLRA. The Wisconsin state courts then granted the employer an injunction preventing employees from engaging in the challenged practice.

The Supreme Court found that "Wisconsin had [entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *Id.* at 149. The Court reasoned that while the NLRA neither explicitly protected nor prohibited the particular bargaining tool chosen by the union members, the Act did implicitly leave to both employees and employers an area of bargaining conduct "to be controlled by the free play of economic forces." "To sanction state regulation of such economic pressure deemed by the federal Act desirabl[y] . . . left for the free play of economic forces . . . is denying one party to an economic contest a weapon that Congress meant him to have available." *Machinists* thus found that the Wisconsin court's action was in conflict with federal law because it trespassed on a bargaining freedom that the NLRA implicitly reserved to the employees. *Id.* at 150 (internal quotations and citation omitted).

B. *Applying Preemption Law to This Case*

1. *Section 14(a) and "Mootness"*

We begin by noting that because appellants chose not to appeal the district court's § 14(a) ruling that "the DWPA's application to supervisors must be enjoined," *Washington Service Contractors*, 858 F. Supp. at 1227, the merits of that portion of the judgment below are not

before us. Appellees claim that we must therefore sustain the entirety of the district court's injunction invalidating the DWPA. Specifically, they argue that determining whether a particular individual is a "supervisor" falls within the "primary jurisdiction" of the NLRB, and that the DWPA is therefore invalid under *Garmon*.

Appellants misconceive the breadth of *Garmon* preemption. As we explain *supra* at 5-6, state law is preempted under *Garmon* when it conflicts with the "primary jurisdiction" of the NLRB to decide whether a certain labor practice is lawful under §§ 7 and 8 of the NLRA. *Cf. Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 914 (9th Cir. 1993) ("A statute falls within the scope of *Garmon* preemption when the statute's terms encompass matters within either the provisions of section 7 or section 8 of the NLRA."). Section 7 of the NLRA protects the rights of employees in collective bargaining, "including their right to strike, their right to picket, and their right to join or not to join a union." *Id.* In this case, the rights of employees to bargain collectively are not affected by the DWPA. The employees remain free to bargain with employers, and to join or not to join a union. The DWPA therefore raises no issue that the NLRB would have jurisdiction to decide under § 7.

Section 8 of the NLRA regulates unfair labor practices. In general, § 8 prohibits employers and labor organizations from interfering with the employee rights protected under § 7. Section 8(a) governs unfair conduct by employers toward employees; section 8(b) regulates unfair labor practices by union organizations. The "terms" of the DWPA thus do not "encompass" any matter even arguably regulated by § 8 of the NLRA. Therefore, while we need not consider the propriety of the district court's § 14(a) ruling on the merits, we reject appellees' suggestion that *Garmon* requires us to broaden it to enjoin all applications of the Act, and so to moot the remaining issues.

2. *The "Successor" Doctrine*

Appellees contend that even if § 14(a) does not necessitate an injunction on all applications of the DWPA, the Act is still preempted by the NLRA because it improperly "attempts to mandate that employers become successors for NLRA purposes." The NLRB's "successorship doctrine" "arises [out of the] operation of the [NLRA]," *Maintenance, Inc.*, 148 N.L.R.B. 1299, 1301 (1964), and requires an employer to recognize and bargain with a union that had been named the bargaining representative of the employees under a predecessor employer if there remains a "substantial continuity in the employing industry." *See, e.g., Miami Industrial Trucks*, 221 N.L.R.B. 1223, 1224 (1975). Whether such "substantial continuity" exists is determined by the Board on the "totality of the circumstances." *See, e.g., International Union of Electrical Workers v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979). Among the factors the Board considers is whether an employer elected to hire its predecessor's employees as a majority of its workforce. *See NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 281 (1972). If so, the Board generally presumes that "the union certified to represent [the predecessor's employees] still represent[s] a majority of the [new employer's employees . . . ." *Id.* at 278-79 (and cases cited).

Appellees argue that under certain circumstances the DWPA could *require* an employer to hire its predecessors' employees as a majority of its workforce, and that the employer would then be required to bargain with the union of its predecessors' employees under the NLRB's successorship doctrine. This, according to appellees and the district court, would represent an "impermissibl[e] intru[sion]" on employers' collective bargaining rights, and the DWPA is therefore preempted under the *Machinists* preemption doctrine. *Washington Service Contractors*, slip op. at 19.

While this argument is not without appeal, it contains a logical flaw. Were a contractor to be required by the DWPA to retain its predecessors' union employees as a majority of its workforce, it is not at all clear whether the NLRB would oblige the new employer to bargain with the union of its predecessors' employees. As we note *supra* at 8, the application of the successorship doctrine depends on the "totality of the circumstances"; where the employer has been required by local law to hire a majority of its predecessors' employees, the NLRB may or may not impose successorship obligations on the new employer. We will not know until the NLRB addresses the issue. At that time, if the NLRB determines that the successorship doctrine does not apply, appellees' alleged "conflict" will disappear. On the other hand, if the NLRB—the body to whom Congress has entrusted the evolution of federal labor policy, *see, e.g., Local 929, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 681 (1983)—determines that the successorship doctrine should apply in such circumstances, it is difficult to see how appellees could argue that the result would invoke "conflict" between the DWPA and the NLRA. Such a ruling by the NLRB would presumably represent the Board's judgment that enforcing its successorship requirement in the context of DWPA hires would be congruent with the aims of the NLRA.

Moreover, even if the NLRB's application of its successorship doctrine to DWPA hires could somehow engender "conflict" between the local and federal Acts, it would not appear to be preemptive conflict within the ambit of the *Machinists* doctrine. As we explain *supra* at 6, *Machinists* indicates that state laws that trespass on bargaining tactics implicitly left open to employees or employers under the NLRA must yield. We cannot imagine any such freedom implicitly left to employers by the NLRA that would be compromised were the NLRB to require employers to recognize the union of DWPA hires. Certainly the NLRA contains no implicit right of

an employer to refuse to hire employees on the basis of union membership, or to refuse to recognize a union approved by the majority of its employees. Indeed, quite the opposite is true—§ 8 of the NLRA affirmatively prohibits the employer from indulging in either of these behaviors. *See, e.g., Burns*, 406 U.S. at 277, 279-80 & n.5. Application of the successorship doctrine under the DWPA therefore would not require the employer to do anything that it has a right under the NLRA to refuse.

C. *Hiring Freedom*

Appellees also argue that quite apart from any conflict that might exist between the DWPA and federal successorship doctrine, the Act is preempted under *Machinists* because the NLRA demonstrates Congress's desire that hiring decisions be left to the "free play of economic forces." 427 U.S. at 150. This argument reflects a misunderstanding of *Machinists* preemption.

Again, *Machinists* held that within the regulatory orbit of the NLRA—*i.e.*, the right of union organization and the collective bargaining process—state and local entities are without authority to suppress particular bargaining tactics. "To sanction state regulation of [] economic pressure deemed by the federal Act desirabl[y] . . . left for the free play of economic forces . . . is denying one party to an economic contest a weapon that Congress meant him to have available." *Id. Machinists* accordingly does not preempt local regulation of *any* facet of the employment relationship, but rather only those laws that disturb the labor dispute resolution system established by the NLRA.

The Supreme Court has therefore declined to apply *Machinists* preemption to state employee protective legislation applicable outside the bargaining context. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985), the Court rejected a *Machinists* challenge to a state law mandating minimum health benefits,

even though such benefits would otherwise have been subject to bargaining between the parties. The Court explained that the NLRA "is concerned [] with establishing an equitable *process* for determining the terms and conditions of employment [emphasis added]," and is "entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id.* In this case, as in *Metropolitan Life*, the local authority has not disturbed the process established by the NLRA for resolving labor disputes. Instead, the District has enacted substantive employee protective legislation having nothing to do with rights to organize or bargain collectively. The NLRA does not preempt such legislation.

D. *The Contracts Clause*

Finally, because we reject appellees' preemption arguments, we must reach their contention that the DWPA violates the Contracts Clause of the Constitution. Article I, § 10 of the Constitution provides in pertinent part that "[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts." Appellees claim that the DWPA violates this prohibition by "forc[ing] contractors to terminate the employment relationship they have with their current employees, and [by] also requir[ing] contractors to establish and maintain an employment relationship with unknown employees of a prior contractor."

Under the Supreme Court's Contracts Clause jurisprudence, the threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corporation v. Romein*, 503 U.S. 181, 186 (1992).

Appellees' claim that the DWPA requires them to "establish and maintain" employment relationships is there-

fore clearly not cognizable under the Contracts Clause. The argument does not suggest that any of the three prongs of *General Motors* are met; there is no existing contractual relationship to be "impaired," to say nothing of "substantially" so.

The contracors' claim that the DWPA "forces [them] to terminate the employment relationship they have with their current employees" is, on its face, more plausibly a Contracts Clause claim. But the argument is not substantiated on the record before this court. On its face, the DWPA only requires contractors to *hire* their predecessors' employees, not to *fire* their own employees. It is therefore not surprising that appellees have shown no instance in which a particular employment contract was "impaired" through operation of the DWPA. This challenge, too, therefore fails the test enunciated by the Supreme Court in *General Motors*.

III. Conclusion

We reject appellees' claims that the DWPA is preempted by the NLRA and invalid under the Contracts Clause. The case is remanded to the district court for proceedings consistent with this opinion.[3]

Reversed and remanded.

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[3] We expect that on remand the district court will limit its injunction to enjoin applications of the DWPA to supervisors only, a disposition to which appellants essentially consented by not appealing the court's prior § 14(a) ruling.

SENTELLE, *Circuit Judge, dissenting:* This is an appeal from a district court judgment granting an injunction against the enforcement of a unique District of Columbia statute known as the District of Columbia Displaced Workers Protection Act of 1994, 41 D.C. Reg. 1011 (to be codified at D.C. CODE ANN. §§ 36-1501 to 1504) ("DWPA"). The DWPA requires service contractors who successfully bid on a contract previously held by a competitor to hire the previous contractor's work staff. The contractor may not then terminate any of those employees for a period of ninety (90) days except for "cause." *Id.* at § 3(e). At the end of the 90 days, the DWPA requires the contractor to perform a written evaluation of the "retained" employees and offer them continued employment if their performance has been "satisfactory." *Id.* at § 3(f). Plaintiffs, appellees here, sought injunction both on the grounds that the statute was preempted by the National Labor Relations Act ("NLRA"), and that the DWPA was violative of the contracts clause of the United States Constitution. The district court did not reach the constitutional grounds, but enjoined the enforcement of the Act on preemption grounds. Because I agree with the district court on the preemption ground, I would affirm its judgment. Like the district court, I would not reach the constitutional question.

ANALYSIS

A. *The "Supervisors" Argument*

The district court held that a provision of the DWPA requiring contractors to retain their predecessors' supervisors in supervisory positions is in conflict with "federal labor policy as enunciated in § 14(a) of the NLRA." *Washington Service Contractors Coalition v. District of Columbia*, 858 F. Supp. 1219, 1226 (D.D.C. 1994). Based on that holding, the court found "that the DWPA's application to supervisors must be enjoined." *Id.* at 1227. The District of Columbia did not appeal from that hold-

ing. Inexplicably, appellees claim that the District's failure to appeal this issue renders the entire appeal moot.

This argument is meritless. On totally separate grounds, the district court enjoined the enforcement of the balance of the Act in all other applications. The District of Columbia did appeal from that holding. Thus, the only question mooted by the District's failure to appeal from the first holding is the question of supervisor coverage. That question is not before us. Therefore, I do not join the majority's discussion of it. I do join the majority's conclusion that the failure to appeal from the 14(a) holding does not moot the rest of this appeal.

B. *The General Preemption Argument*

In addition to its 14(a) holding on which the district court based its application of the DWPA to supervisors, the district court also held, in a separately delineated section of its opinion, that the entire DWPA is preempted by the NLRA on grounds related to the doctrine of successorship under the NLRA, and on that basis and that basis alone, the district court enjoined the enforcement of the DWPA in all cases. *Contractors*, 858 F. Supp. at 1229-30. It is from this holding that the District of Columbia appeals and it is this holding that I would affirm.

In my view, the district court's opinion reflects the proper preemption analysis under federal labor law. In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971), the Supreme Court held that where preemption under the NLRA is otherwise appropriate, the only relevant exception exists where the arguably preempted "rule of law . . . is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interest promoted by the federal labor statutes." I submit that this Supreme Court declaration governs this case.

The basic approach to preemption questions under the NLRA is enunciated by the Supreme Court in *San Diego*

Building Trades Council v. Garmon, 359 U.S. 236 (1959), as further elucidated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), and in *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). The *Lockridge* Court, in explaining *Garmon* and the resulting line of labor preemption cases, noted, as the majority here suggests, that "we cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions;" but at the same time declared that federal courts cannot "proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy." 403 U.S. at 289. The majority's refusal to find preemption in the present context based upon its determination that the NLRB could apply its successorship doctrine to DWPA hires in a fashion that would avoid conflict seems to me to reverse the Supreme Court's *Garmon/Lockridge* analysis and undertake the case-by-case approach rejected by the Supreme Court in that decision.

The proper question under *Garmon* is not whether some applications of the local law directly violate the NLRA, but rather whether "it is clear or may fairly be assumed that the activities which a state [or in this case the District of Columbia] purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8. . . ." 359 U.S. at 244. If the answer is yes, then "due regard for the federal enactment requires that state jurisdiction must yield." *Id.*

As the district court recognized, the Supreme Court later expanded NLRA preemption from the *Garmon* foundation to a second category in *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). The *Machinists* Court proceeded from recognition of *Teamsters Union v. Morton*, 377 U.S.

252 (1964), that even where conduct is "neither protected nor prohibited [by § 7 or § 8], it is still necessary to determine whether . . . 'Congress occupied this field and closed it to state regulation.'" *Id.* at 258 (quoting *Automobile Workers v. O'Brien*, 339 U.S. 454, 457). This "occupation of the field" referred not to the entire field of labor law, but rather to the particular area of activity within the field of labor law about which the state government is purporting to enforce regulations. The *Machinists* Court noted that even before *Morton*, in *Garmon* itself, the Court had "expressly recognized that 'the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states.'" *Machinists*, 427 U.S. at 144-45 (quoting *Garmon*, 359 U.S. at 245). From this existing precedent, the *Machinists* Court derived the principle, previously suggested in *Garmon* and *Morton*, that state regulation is preempted not only by the specifics of §§ 7 and 8, but also where conduct has been "left by Congress to the free play of economic forces . . . ." *Machinists*, 427 U.S. at 147. The district court held, in my view correctly, that the DWPA intrudes upon this latter sort of preempted area.

In *John Wylie & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964), the Supreme Court expressly recognized "the rightful prerogative of owners independently to rearrange their businesses . . . ." In *National Labor Relations Board v. Burns International Security Services*, 406 U.S. 272 (1972), the Court recognized that there had never been a holding that the NLRA "requires that an employer who submits the winning bid for a service contract . . . [is] obligated to hire all of the employees of the predecessor . . . ." *Id.* at 280 n.5. And in *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249 (1974), the Court cited *Burns* as establishing that a "successor" employer "ha[s] the right not to hire any of the former [predecessor] employees, if it so desire[s]." *Id.* at 262.

Where an employer purchasing the assets of another business chooses to hire his predecessor's employees, federal law does erect a successorship obligation of bargaining with specific and fairly complex rules. *See generally John Wylie & Sons*, *supra*, and *Howard Johnson*, *supra*. Where the successorship doctrine does not apply, it seems apparent to me that under the NLRA as interpreted by the Supreme Court, Congress intentionally left the area of successorship obligations to be controlled by the free play of market forces; therefore, *Machinists* preemption applies; therefore, I would affirm.

APPENDIX B

[Filed Jul. 11, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1127

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

REVISED [1] MEMORANDUM OPINION

The plaintiffs in this case, a group of private contractors, are challenging a newly-enacted District of Columbia statute, the Displaced Workers Protection Act of 1994, D.C. Code §§ 36-501 *et seq.* ("the DWPA"). After carefully considering the plaintiffs' arguments, as well as those of the defendants and intervenors, the Court finds that the DWPA is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the NLRA"), and is thus invalid and unenforceable. Accordingly, the Court will grant summary judgment in favor of the plaintiffs.

I. BACKGROUND

The relevant facts in this case do not appear to be in dispute.[2] The DWPA was enacted by the Council of the District of Columbia ("the City Council") and approved

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[1] After the Court issued its Memorandum Opinion on July 8, 1994, the Court discovered that there were several typographical errors in the Opinion. This Revised Memorandum Opinion corrects those errors but does not make any substantive changes.

[2] The parties dispute several issues of fact relating to the general hiring practices of the plaintiffs and other service contractors. However, these facts are not material to the legal issues before the Court.

by Mayor Sharon Pratt Kelly on February 17, 1994. It became law on April 26, 1994, following a period of congressional review. The DWPA essentially requires contractors who provide certain types of services to retain many of their predecessors' employees after the contractors have taken over service contracts.[3]

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[3] The text of the DWPA reads:

Sec. 2. Covered employees.

(a) This act shall apply to the following employees, except persons employed less than 15 hours per week and except persons employed in an executive, administrative, or professional capacity as defined by the Secretary of Labor under § 13(a)(1) of the Fair Labor Standards Act (129 U.S.C. § 213(a)(1)) [sic] or required by District of Columbia law in effect on the effective date of this act to possess an occupational license:

(1) Employees hired by a contractor as food service workers in a hotel, restaurant, cafeteria, apartment building, hospital, nursing care facility, or similar establishment.

(2) Employees hired by a contractor to perform janitorial or building maintenance services in an office building, institution, or similar establishment.

(3) Non-professional employees hired by a contractor to perform health care or related support services in a hospital, nursing care facility, or similar establishment.

(b) For the purposes of this act "Contractor" includes a subcontractor and means an individual or company that employs 25 or more persons.

Sec. 3. Transition employment period.

(a) The present contractor within a period of 10 days after the awarding of a contract shall make available to prospective contractors the names of all employees of the present contractor employed at the site or sites covered by the prospective contract, the date each employee was hired, and the employee's occupation classification.

(b) The new contractor who is awarded a contract to provide similar covered services provided by the previous contractor shall retain, for a 90-day transition employment period, covered employees who have been employed by the previous contractor for the preceding 8 months or longer at the site or sites covered by the contract.

(c) If at anytime, the new contractor determines that fewer employees are required to perform the new contract than were

The DWPA applies to contractors who employ 25 or more persons and perform food, janitorial, building main-

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required by the previous contractor, the new contractor shall retain employees by seniority within job classifications.

(d) During the 90-day transition employment period, the new contractor shall maintain a preferential hiring list of eligible covered employees not retained by the new contractor from which the new contractor may hire additional employees.

(e) Except as provided in subsection (c) of this section, the new contractor shall not discharge an employee retained pursuant to this act during the 90-day transition period without cause.

(f) At the end of the 90-day transition employment period, the new contractor shall perform a written performance evaluation for each employee retained pursuant to this act. If the employee's performance during the 90-day transition period is satisfactory, the new contractor shall offer the employee continued employment under the terms and conditions established by the new contractor.

(g) If a contractor's contract at an establishment in the District of Columbia is not renewed, and within 30 days the contractor is awarded a similar contract at another establishment in the District of Columbia, the contractor shall retain 50% of the employees from each establishment as needed to perform the contract.

Sec. 4. Enforcement.

(a) An employee who has been wrongfully discharged by a new contractor may bring an action in the Superior Court of the District of Columbia and may be awarded:

(1) Back pay for each day the violation continues at a rate of compensation not less than the higher of:

(A) The average regular rate of pay received by the employee during the last 3 years of the employee's employment in the same occupation classification; or

(B) The final regular rate received by the employee; and

(2) Costs of benefits the new contractor would have incurred for the employee under the new contractor's benefit plan.

(b) In any suit, the court shall allow the prevailing party reasonable attorney's fees as part of the costs recoverable.

(c) This act shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination.

Sec. 5. Rules.

The Mayor shall promulgate rules to implement this act.

D.C. Code §§ 36-1501 to 36-1504.

tenance, and health care services. D.C. Code § 36-1501(a)(1)-(3). Section 3(a) of the DWPA requires an outgoing contractor at a particular site to provide the contractor who will succeed it at the site with a list of employees, the dates the employees were hired, and their occupation classifications. *Id.* § 36-1502(a). Section 3 goes on to state that if the new contractor is providing services similar to those of the previous contractor, it is then required to retain for 90 days all employees who had been employed by the previous contractor for eight months or more.[4] *Id.* § 36-1502(b). During that 90-day period, the new contractor may not dismiss a retained employee without cause. *Id.* § 36-1502(e). After the 90-day transition period, if a written evaluation indicates that the employee's performance has been satisfactory, § 3(f) states that the new contractor "shall offer" continued employment to the retained employee under terms established by the new contractor. *Id.* § 36-1502(f). Section 4 provides that any employee who has been wrongfully discharged may sue in the Superior Court of the District of Columbia and obtain backpay, costs of lost employment benefits, and reasonable attorney's fees. *Id.* § 36-1503.

According to the Report of the Committee on Labor, the purpose of the DWPA is:

> to prohibit contractors or subcontractors who acquire or provide services under a negotiated or competitive bidding procedure from displacing employees employed by the contractor or subcontractors who loss [sic] or gave up the contract by establishing a 90-day probationary period during which the contractor or subcontractor is prohibited from terminating an employee except for just and sufficient cause.

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[4] This is subject to an exception for times when the new contractor determines that fewer employees are necessary to perform the contracted services. In those situations, the new contractor is required to retain employees based upon seniority within their job classifications. *Id.* § 36-1502(c).

Report on Bill 10-307, Intervenors' Motion for Summary Judgment, Appendix B ("Intervenors' Appendix B)") at 1.[5]

The legislative history indicates that the City Council heard testimony in favor of and against the DWPA. Carolyn Jones, the Deputy Director for Employment Security Services at the District of Columbia's Department of Employment Services testified in favor of the DWPA, saying that the law "could significantly impact the reduction of the number of unemployed D.C. residents currently collecting unemployment benefits in the job categories covered by the bill." *Id.* at 14. This testimony and other parts of the legislative history suggest that the DWPA was passed in order to prevent certain workers from becoming unemployed merely because a service contract has changed hands. *See, e.g., id.* at 18-22, 61-71. The DWPA was strongly backed by the members of Local 82 of the Service Employees International Union ("SEIU"), which has supported a campaign called Justice for Janitors. *See id.* at 55-62. The DWPA also drew some support from the business community. *See id.* at 23-28, 45-48. However, several other business groups and the District of Columbia Chamber of Commerce opposed the DWPA. *See id.* at 29-44, 73-86.

The plaintiffs are companies that have contracts to perform various food, janitorial or building maintenance services in the District of Columbia area. Some of the plaintiffs are non-union companies. P&R Enterprises, one of the plaintiffs, took over a contract in the District on April 30, 1994, and expects to take over additional contracts in the immediate future. It has received communications from Local 82 of the SEIU in which the union local demands recognition because it represents employees whom P&R was required to hire under the DWPA. Affidavit of Richard Thompson at ¶¶ 2, 11. At least one

[5] This legislative history is also attached to the motion to dismiss filed by defendants District of Columbia and Kelly.

predecessor's supervisor has asked P&R to retain her pursuant to the DWPA. Second Affidavit of Richard Thompson at ¶ 2.

On May 24, 1994, the plaintiffs filed this action and requested a temporary restraining order to enjoin the enforcement of the DWPA. The plaintiffs challenge the DWPA on various grounds. The plaintiffs claim that the DWPA is preempted by the NLRA, 29 U.S.C. §§ 151 *et seq.*, and the Labor Management Relations Act, 29 U.S.C. § 185. The plaintiffs also allege that the DWPA violates the Contracts Clause of the United States Constitution, U.S. Const. art. I, § 10. The plaintiffs claim, *inter alia*, that the DWPA's retention provisions effectively require nonunion contractors to recognize unions.

After a hearing on May 25, 1994, the Court denied the motion for a temporary restraining order and consolidated this matter pursuant to Fed. R. Civ. P. 65(2). On June 7, 1994, the Court conducted a hearing on the consolidated dispositive motions.[6] At the hearing, the Court permitted the SEIU and SEIU Local 82 to intervene as defendants in this matter pursuant to Fed. R. Civ. P. 24(b). After hearing argument on the motions, the Court took this matter under advisement.

II. DISCUSSION

The plaintiffs argue that the DWPA is preempted by the NLRA for several reasons: (1) the DWPA interferes with the plaintiffs' right under the NLRA to fire or refuse to hire supervisors because of their union involvement; (2) the DWPA deprives the plaintiffs of the freedom to choose their own representatives for purposes of adjusting grievances; (3) the DWPA deprives the plaintiffs of their federally protected right to hire their own work force

[6] The plaintiffs' motion for a preliminary injunction is treated as a motion for summary judgment. Defendants District of Columbia and Mayor Kelly have filed a motion to dismiss. The intervenors have also filed a motion for summary judgment.

upon taking over a contract; and (4) the DWPA interferes with the plaintiffs' freedom to set initial terms of employment. The plaintiffs further argue that the DWPA impairs their contract rights under the United States Constitution.

There are two dominant theories of NLRA preemption.[7] These theories stem from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). *Garmon* holds that state or local regulations of activities are preempted when the activities are protected or prohibited by the NLRA. 359 U.S. at 244-45. In order to avoid interference with national policy, state or local activities may be preempted under *Garmon* when the activity is even "arguably" protected or prohibited by the NLRA. *Id.* *Machinists* holds that state or local regulations are preempted when they attempt to govern actions that Congress intended to leave unregulated. 427 U.S. at 140-41. The parties dispute whether either preemption theory applies to the DWPA.

A. The DWPA and Contractors' Selection of Supervisors

The plaintiffs argue that the NLRA invalidates the DWPA because the DWPA conflicts with § 14(a) of the NLRA.[8]

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[7] Theories of federal preemption are based upon the Supremacy Clause of the Constitution, which states that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

[8] The defendants argue that the plaintiffs' challenge is not ripe. In order for a matter to be ripe for review, the plaintiffs must demonstrate that their injury or threat of injury is both "real and immediate" and not merely "conjectural" or "hypothetical." *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). Although plaintiffs are not always required to wait for actual enforcement before challenging a statute, the mere existence of a statute that plaintiffs reasonably believe should apply to and be enforced against them does not create a case or controversy. *United Public Workers v. Mitchell*, 330 U.S. 75, 91 (1947), *overruled on other grounds by*

Section 14(a) provides that employers are not required to treat "supervisors" as "employees." 29 U.S.C. § 164(a).[9] Specifically, § 14(a) states that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." *Id.* This provision specifically excludes supervisors from protection so that employers may demand loyalty from their supervisors. *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 812 (1974). Employers may, in fact, insist that a supervisor refrain from any union activity. *Id.* The plaintiffs argue that the DWPA conflicts with the NLRA

Adler v. Board of Education, 342 U.S. 485 (1952). Because present harms can flow from the threat of future actions, declaratory relief can sometimes be granted to protect against a feared future event. In such situations, the plaintiff must demonstrate that the probability of the future event occurring is real and substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Armstrong World Industries v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992).

The plaintiffs in this case have demonstrated a real and substantial probability of harm. The plaintiffs have provided affidavits that indicate that contractors have received demands that they hire the employees of their predecessors. Affidavit of Richard Thompson at ¶ 11; Second Affidavit of Richard Thompson at ¶ 2; Affidavit of Joel Felrice at ¶¶ 2, 6. Some of these demands appears to be made by the SEIU. *E.g.*, Second Affidavit of Richard Thompson at ¶ 2 and Attachments. Additionally, at least one supervisor has requested that a contractor retain her pursuant to the DWPA. *Id.* at ¶ 2. Finally, at least one action has been filed in which employees seek to enforce the DWPA. *See Adams v. Washington Hospital Center*, Civil Action No. 94-1351 (JHG) (removed from District of Columbia Superior Court). These facts suggest that the plaintiffs' concerns are not merely speculative. If the plaintiffs fail to retain workers as required by the DWPA, they face the very real possibility that they will have to defend themselves against numerous lawsuits and risk paying significant amounts of potential damages and attorney's fees. Thus, the Court finds that this action is ripe.

[9] Section 2(3) of the NLRA also specifically excludes supervisors from the definition of employees. 29 U.S.C. § 152(3).

and must be enjoined because the DWPA fails to exempt supervisors from its requirements.[10]

The Court must first examine the DWPA to determine whether its protections extend to supervisors, as the plaintiffs allege. Section 2 of the DWPA lists types of covered employees, including food service workers, janitors, and non-professional health care workers, but does not use the word "supervisors." D.C. Code § 36-1501(a)(1)-(3). Section 2 also states that the DWPA does not apply to persons who work less than 15 hours a week, those "employed in an executive, administrative, or professional capacity" as defined by the Fair Labor Standards Act or those required by District law to possess a license. *Id.* § 36-1501(a). Since the DWPA specifically exempts certain types of employees from its coverage but does not exempt supervisors, it appears that the DWPA, on its face, applies to supervisors.

The legislative history of the DWPA further suggests that the City Council expressly considered whether or not to exclude supervisors and chose not to do so. A prior draft of the DWPA specifically excluded "supervisory" employees. Intervenors' Appendix B at 8. Further, Carolyn Jones of the Department of Employment Services specifically mentioned in her testimony that the definition of employee had been narrowed to eliminate supervisors from the DWPA's coverage. *Id.* at 14. Nevertheless, supervisors were not expressly excluded in the final version of the DWPA that has become law. In light of the fact that the City Council expressly considered this matter and even exempted supervisors in a prior draft of the DWPA,

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[10] This challenge pursuant to § 14(a) does not technically appear to be a *Garmon* preemption argument. *Garmon* is concerned with preemption of state regulation of actions that are protected under § 7 or prohibited under § 8 of the NLRA. 359 U.S. at 244-45. Section 14(a) specifically prohibits state or local laws that deem supervisors to be employees. However, both § 14(a) and *Garmon* preemption are geared toward the same goal: invalidating state or local laws that interfere with federal labor law.

the City Council's failure to exempt supervisors in the final version of the DWPA strongly suggests that the City Council intended for the DWPA to apply to supervisors. Thus, the Court finds that supervisors are covered employees within the meaning of the DWPA.

Recognizing that the DWPA applies to supervisors, the plaintiffs argue that the DWPA impermissibly infringes upon contractors' NLRA rights. Absent the DWPA, a contractor taking over a contract from a predecessor would have no duty to hire the predecessor's supervisors. If the predecessor contractor was unionized, its supervisors may very well have loyalties that are not consistent with the philosophy of the new contractor. The plaintiffs argue that the DWPA improperly forces them to hire supervisors who may not be loyal to them. They further argue that the DWPA may limit their ability to fire these supervisors if they later learn that their supervisors are not loyal. If an employer chooses either not to hire or to fire a supervisor, the plaintiffs argue that they will be forced to litigate issues including whether the particular worker was actually a supervisor and whether the reasons for firing the supervisor constituted cause under the DWPA.

The fact that the DWPA treats supervisors as employees raises serious concerns. The Supreme Court of the United States has held that the portion of § 14(a) of the NLRA that relieves "the employer of obligations under any law, either national or local, relating to collective bargaining applies to any law that requires an employer to accord to the front line of management the anomalous status of employees." *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 662 (1974) (citations and internal quotations omitted). In *Beasley*, the Supreme Court found that a North Carolina right-to-work law providing a cause of action to individuals discharged because of their union membership could not be applied to supervisors. *Id.* at 655-56. The Court found that the enforcement of such a state statute would be inconsistent with

§ 14(a)'s goal of allowing employers to ensure that their supervisors are loyal to management. *Id.* at 659-62. When viewed in light of *Beasley*, it appears that the DWPA conflicts with § 14(a) by requiring employers to treat supervisors as employees and thus infringes upon contractors' abilities to ensure the loyalty of their supervisors. Additionally, like the right-to-work law in *Beasley*, the DWPA also appears to violate § 14(a) because it provides supervisors with a cause of action if they are discharged for union activities.

The defendants argue that § 14(a) does not conflict with the DWPA because the DWPA is not a law "relating to collective bargaining." This argument has some initial appeal because the DWPA does not make any explicit references to collective bargaining. Although the DWPA does not discuss collective bargaining, it nevertheless has a substantial effect on the collective bargaining relationships between contractors and their employees. For example, the DWPA may, in some instances, serve as a means of imposing a duty to bargain upon a contractor who did not have unionized employees prior to the DWPA.[11] In addition, the DWPA appears to require contractors to retain their predecessors' supervisors even if the supervisors are members of a union and are not loyal to their employers. In such applications, the DWPA certainly relates to collective bargaining.

The defendants also attempt to construct interpretations of the DWPA that would avoid the concerns raised by § 14(a). The defendants first argue that the DWPA does not raise any problems under § 14(a) because it does not specifically require that supervisors be retained in supervisory positions. The defendants further argue that even if supervisors must be retained as supervisors, lack of loyalty to the new contractor would provide sufficient cause to justify dismissal under § 2(e) of the DWPA. D.C. Code § 1502(e). Such interpretations, they argue,

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[11] The Court will discuss this matter in further detail *infra*.

eliminate any concerns related to § 14(a) of the NLRA. These arguments do not persuade the Court.

Although the defendants argue that a predecessor's supervisor may be retained in a nonsupervisory capacity, the Court can find no support for this interpretation of the DWPA. The text of the DWPA does not state that a supervisor may be retained in a nonsupervisory position. In fact, the text suggests the opposite conclusion. Section 3(a) of the DWPA states that a predecessor contractor should provide information about each "employee's employment classification" to an incoming contractor. D.C. Code § 36-1502(a). Also, the DWPA states that if a new contractor cannot hire all eligible employees, it should retain employees based on seniority "within job classification." *Id.* § 36-1502(c). These references to job classifications suggest that the City Council anticipated that employees (including supervisors) would be retained in positions within the same job classification. Additionally, the defendants' interpretation of the DWPA presents practical concerns. For example, if a contractor is required to hire a predecessor's supervisors and employees, it would be required either to place some of the retained workers in supervisory positions or to bring in additional outside supervisors, increasing the contractor's costs. Affidavit of Joel Felrice at ¶ 7.[12] The defendants have pointed to nothing in the text or legislative history that would support their view that the DWPA does not require supervisors to be retained in supervisory positions. The Court will not attempt to construe the DWPA in a manner inconsistent with its plain language merely because a

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[12] The Court also notes that one of the plaintiffs has received correspondence from the SEIU indicating that at least one supervisor, Rosalina Aleman, sought to be retained pursuant to the DWPA. Second Affidavit of Richard Thompson at ¶ 2. The fact that Aleman designated herself as a supervisor and that the request was made on SEIU letterhead suggests that both the SEIU and Aleman would like Aleman retained as a supervisor. This contradicts the argument being presented to the Court.

novel interpretation might prevent the DWPA from being invalidated. *Aptheker v. Secretary of State*, 378 U.S. 500, 515-16 (1964).[13]

The Court is also unpersuaded by the defendants' argument that the § 14(a) problem may be avoided if "cause" in § 3(e) of the DWPA is interpreted to permit contractors to discharge supervisors who refuse to refrain from union activities. Even if the forthcoming regulations or the Superior Court's interpretations consider § 14(a) and cases such as *Beasley*, any actions brought by supervisors in the Superior Court would still require courts to decide whether or not a particular individual was, in fact, a supervisor and whether the individual was actually discharged for reasons that are compatible with § 14(a) of the NLRA. Such determinations are difficult NLRA questions that should not be left to the District of Columbia courts, but should be consistently determined by the NLRB in accordance with federal labor policy. *Local 929, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 681 (1983).[14]

The Court finds that the DWPA requires contractors to retain their predecessors' supervisors and requires contractors to retain the supervisors in supervisory positions. To the extent that the DWPA requires employers to retain supervisors in supervisory positions, it directly conflicts with federal labor policy as enunciated in § 14(a) of the

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[13] Theoretically, the defendants' interpretation could find support in the forthcoming regulations. However, the Court must make its decision based upon the statute and the record before it, not based upon speculation about how the Mayor might interpret the statute. Further, even if the defendants' interpretations of the DWPA were correct, the DWPA is nevertheless invalidated by *Machinists* preemption, as discussed *infra*.

[14] For example, the meaning of the term "supervisors" is frequently litigated and continues to be interpreted by the Supreme Court. *See NLRB v. Health Care & Retirement Corp.*, 62 U.S.L.W. 4371 (U.S. May 23, 1994).

NLRA. Accordingly, the Court finds that the DWPA's application to supervisors must be enjoined.[15]

B. The DWPA's Effect on Contractors' Rights to Hire Workers

In addition to challenging the DWPA as it applies to supervisors, the plaintiffs attack the DWPA as a whole. The plaintiffs argue that the DWPA impermissibly intrudes into contractors' hiring decisions and is subject to *Machinists* preemption because Congress intended for hiring decisions to be unregulated. First, the plaintiffs argue that the DWPA improperly regulates their right to hire whomever they wish. Second, they argue that the DWPA will cause contractors who take over unionized workforces to become successors because a majority of their employees will have been employees of their predecessors. Third, thy argue that because new contractors will know from the outset that a majority of their employees will be former employees of their predecessors, the right to set initial terms and conditions will be superseded by an immediate requirement to bargain with the unions. A review of the relevant law indicates that the plaintiffs are correct.

The Supreme Court has stated that employers have "the rightful prerogative . . . independently to rearrange their businesses." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964). Despite this prerogative, if a new employer is considered to be a "successor" of a previous employer, the new employer has an obligation to bargain with the union that represented the previous employer's workers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40-46 (1987). The determination as to whether an employer is a successor is a factual one

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[15] The plaintiffs have also argued that the DWPA should be preempted under *Garmon* because it restrains employers' abilities to select their collective bargaining representatives under § 8(b)(1)(B) of the NLRA. Because the Court finds that the DWPA's application to supervisors conflicts with § 14(a) of the NLRA, it does not need to address this argument.

which focuses on whether there is a substantial continuity between the old and new enterprises. *Id.* at 43.[16] The focus is on whether retained employees view their job situations as essentially unaltered. *Id.* Thus, if a new employer makes a conscious decision to hire a majority of its employees from its predecessor and maintains the same general business, the new employer is a successor with a duty to bargain with a union. *Id.* at 41.

Although a successor is obligated to bargain with a union, a successor is "ordinarily free to set initial terms on which it will hire the employees of a predecessor" and is not bound by the terms of the predecessor's collective bargaining agreement. *NLRB v. Burns International Security Servs., Inc.*, 406 U.S. 272, 294 (1972). The duty to bargain does not arise until the successor has hired a "substantial and representative complement" of its employees. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 47. If, at that time, a majority of a successor's employees are individuals who had been employed by the predecessor, the duty to bargain with the union that represented the predecessor's employees arises. *Id.* However, if it is clear from the beginning that a successor will retain all of a predecessor's employees, a duty to bargain over initial terms and conditions of employment may arise immediately. *Burns*, 406 U.S. at 294-95.

The defendants argue that although the NLRA does not require a successor to hire a predecessor's employees, it does not bar states from regulating whom successors choose to hire. This position ignores the goal of *Machinists* preemption. The mere fact that the NLRA does not protect or prohibit certain conduct does not mean

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[16] In determining whether there is substantial continuity, the NLRB examines a number of factors, including: whether the business of the employers is essentially the same; whether the employees of the new company are doing the same jobs in the same conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Id.*

that the conduct cannot be preempted by the NLRA. Where, as here, a state or local statute attempts to regulate an area that Congress intended to leave to be determined by the free play of economic forces and the statute significantly affects the balance of power between labor and management, the statute is preempted. *Machinists*, 427 U.S. at 140-51.

An employer's hiring selections are fundamental decisions that Congress has only regulated in very limited situations. In *Burns*, the Supreme Court stated that an employer has no obligation to hire any of its predecessor's employees. 406 U.S. at 280 n.5. In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), the Court expanded this concept, stating that *Burns* establishes that an employer "had the right not to hire any" of its predecessor's employees, if it so desired. *Id.* at 262. The Court also stated that a new employer has a "right to operate the enterprise with his own independent labor force." *Id.* at 264. These rights are only limited by § 8(a)(3) of the NLRA, which prohibits discrimination on the basis of union membership or activity. 29 U.S.C. § 158(a)(3). Thus, the vast majority of an employer's hiring decisions have been left unregulated by the NLRA.

In light of this lack of regulation, the Court must decide whether Congress intentionally left this area to be controlled by the free play of economic forces so that *Machinists* preemption applies. *Machinists*, 427 U.S. at 140; *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 749 (1985). *Machinists* preemption has been applied to situations where states seek to regulate traditional economic weapons of labor and management. *E.g., Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 619 (1986) (invalidating city action conditioning renewal of taxi franchise on settlement of labor dispute). However, it is not used indiscriminately and has not been applied to strike down state laws that establish minimum labor standards. *E.g., Metropolitan Life Insurance Co.*, 471 U.S. at 752-58 (mandatory minimum

mental health care benefit not preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-23 (1987) (mandatory one-time severance payment after plant closing not preempted). The Court has found no cases directly addressing whether *Machinists* preemption should apply when a state or local statute or regulation curtails a private employer's hiring decisions.

The defendants argue that *Machinists* preemption is inappropriate here because the DWPA does not directly affect collective bargaining agreements and does not regulate any traditional economic weapons of management or labor. This oversimplifies *Machinists* preemption and takes a myopic view of the effects of the DWPA. The DWPA on its face requires contractors to hire certain individuals on a temporary basis and then offer them employment if their performance is satisfactory. D.C. Code § 36-1502. Neither the parties nor the Court are aware of any other state or local statute that affirmatively requires private employers to hire particular individuals.[17] The unprecedented nature of this intrusion on an employer's prerogative to select members of its workforce suggests that an employer's hiring decisions are matters that Congress purposely allowed to be governed by the free market.[18] The DWPA certainly inhibits the free play

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[17] Congress and the District have passed laws prohibiting private employers from refusing to hire individuals for discriminatory reasons. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*; District of Columbia Human Rights Act, D.C. Code §§ 1-2501 *et seq.* However, no jurisdiction has previously told a private employer via legislation that it must hire particular individuals regardless of the reasons why the employer may not wish to hire the individuals.

[18] The fact that no state or local government has previously attempted to force a private employer to hire specific individuals belies any argument that the DWPA is simply an attempt to regulate matters "so deeply rooted in local law that courts should not assume that Congress intended to preempt application of state law." *Belknap, Inc. v. Hale*, 463 U.S. 491, 508 (1983). This is an area that state and local governments have never before attempted to regulate.

of economic forces by restricting an employer's freedom to make hiring decisions, but it is not clear whether this inhibition on free enterprise alone would be adequate to justify NLRA preemption.

Regardless of whether the DWPA's effect on free enterprise would raise preemption concerns, its collateral impact on collective bargaining so significantly alters the balance of power between labor and management that this Court must find that the DWPA is preempted by the NLRA. *Machinists*, 427 U.S. at 149-151. Unlike the statutes in *Fort Halifax Packing Co.* and *Metropolitan Life Insurance Co.*, the DWPA does not simply set a minimum labor standard. Instead, it creates a system that "impermissibly intrude[s] upon the collective bargaining process." *Fort Halifax Packing Co.*, 482 U.S. at 23. By requiring employers to retain their predecessors' employees, the DWPA attempts to mandate that employers become "successors" for NLRA purposes. This serves to impose upon employers a duty to bargain that would not necessarily arise in the free market. The DWPA's effect will become even greater in some situations because the duty to bargain will arise immediately, precluding an employer from even setting the initial terms and conditions of employment. Such effects interfere significantly with the traditional collective bargaining positions of labor and management.

These collateral effects of the DWPA are not merely speculative. At least one of the plaintiffs has already received a demand from the SEIU seeking to bargain over initial terms and conditions of employment.[19] *See* Second Affidavit of Richard Thompson at ¶ 2 and Attachments. P&R Enterprises, Inc. was awarded a contract to clean a building in May, 1994. *Id.* In a letter dated May 23, 1994, Jay Hessey, Executive Director of Local 82 of the

[19] Additionally, the SEIU and several individuals have filed a suit seeking to enforce the DWPA. *See Adams*, Civil Action No. 94-1351. The defendants in that suit are not parties to this action.

SEIU, indicated that the workers at the building were represented by the union. *Id.* The letter further requested that P&R begin bargaining over the initial terms and conditions of employment. *Id.*[20] As discussed *supra*, no duty to bargain ordinarily arises unless a majority of the employees of a successor employer were employees of the predecessor employer. *Fall River*, 482 U.S. at 41. Absent the DWPA, there is no question that there would be no duty to bargain with the union merely because P&R was awarded the contract. The DWPA alters this scenario by requiring contractors such as P&R to retain workers whom they may not wish to hire and triggering a duty to bargain with the union that represents these workers.

This hiring requirement and its role in triggering the duty to bargain serves to upset the balance of power between labor and management. The DWPA upsets this balance by placing nonunion companies in positions where they will be required to recognize unions when they take over contracts from predecessors with unionized workforces. This puts employers in a worse position that they would be in the free market as envisioned by the NLRA. It also serves to put unions in a better position by relieving them of the time and expense ordinarily related to seeking recognition and bargaining rights. Once a union gains a foothold in a particular site, the DWPA effectively serves to keep that site unionized, regardless of what company takes over the contract at that site. This is not consistent with the NLRA:

The DWPA does not interfere in collective bargaining relationships every time it applies. Its improper effect is limited to situations where a contractor takes over a contract at a site where the employees were previously organized and represented by a union. Nevertheless, the

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[20] This situation involving P&R, the fact that other plaintiffs are or will soon take over contracts in the District of Columbia, and the fact that at least one lawsuit has been filed under the DWPA all indicate that there is a real controversy at stake here. The Court thus finds that these claims are also ripe for review.

long-term effect of the DWPA's hiring requirements would be to entrench unions at particular sites. Under the law prior to the passage of the DWPA, a bargaining obligation would only arise if a new employer made "a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor." *Id.* Under the DWPA, employers' hiring choices are no longer conscious decisions. The duty to bargain becomes a matter of course when a contractor takes over a new site. Such a result provides substantial additional power to labor unions.[21] Thus, in passing the DWPA, the District of Columbia "has put its thumb on the balance scale between management and labor in a private industry, which a local government may not do." *Alameda Newspapers, Inc. v. City of Oakland*, No. C-93-3500-CAL, 1994 U.S. Dist. LEXIS 5960, at *16 (N.D. Cal. April 29, 1994) (municipal resolution endorsing boycott of newspaper until labor dispute resolved preempted under *Machinists*).[22] Accordingly, the Court finds

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[21] The defendants assert that the plaintiffs are arguing for a right to discriminate against unionized workers. Such discrimination is prohibited. 29 U.S.C. 158(a)(3). Nevertheless, there are numerous legitimate and nondiscriminatory reasons why a successor may not want to hire its predecessors' employees. For example, an employer may choose not to hire a particular worker because of that individual's past attendance record, poor work quality, prior insubordination or for a myriad of other reasons. Since the quality of an employer's workers may affect the awarding of future contracts, the hiring decision is an important tool. The DWPA strips the plaintiffs of this legitimate and valuable economic tool while simultaneously adding to the plaintiffs' collective bargaining obligations by creating a system that will impose collective bargaining obligations where they would not normally exist. This deprives employers of their rights and disrupts the collective bargaining process. *Machinists*, 427 U.S. 146-48.

[22] It cannot be argued that the DWPA's effect on collective bargaining was an unforeseen consequence. The legislative history indicates that the City Council was told that the DWPA could force a new employer to recognize and bargain with a union that represented the employees of a contractor's predecessor. Inter-

that the DWPA is preempted by the NLRA.[28] There being no genuine issue of material fact, the plaintiffs are thus entitled to summary judgment pursuant Fed. R. Civ. P. 56.

III. CONCLUSION

In attempting to require that contractors retain certain supervisors, the DWPA directly conflicts with § 14(a) of the NLRA. Additionally, the retention provisions of the DWPA are an unprecedented incursion into an area that was previously unregulated. In entering this area, the District's City Council has, whether consciously or not, upset the delicate balance between labor and management that is governed by the NLRA. Because the DWPA attempts to regulate an area that Congress has left unregulated and does so in a way that upsets the traditional balance of power in labor relations, the DWPA is preempted by the NLRA. Accordingly, the Court will grant summary judgment for the plaintiffs, deny the defendants' motion to dismiss, and deny the intervenors' motion for summary judgment. The Court will enter a declaratory judgment stating that the DWPA is unenforceable because it is preempted by the NLRA and

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venors' Appendix B at 78. Additionally, a noted labor law scholar has written an article in which he speculates about the collateral effects of a hypothetical state statute that attempts to protect employees' jobs when a business changes hands. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 Yale J. on Reg. 355, 418-25 (1990). In this article, Professor Gottesman specifically discusses how such a hypothetical statute could interact with federal labor laws to impose a duty to bargain with a union from the moment an employer purchases an existing company. *Id.* at 424. Although this article reaches a different conclusion that this Court as to whether such a statute would be preempted by the NLRA, its author admits that his opinions may be colored by his extensive experiences representing unions. *Id.* at 355.

[28] Because of the Court's holding, it will express no view on the plaintiffs' claims that the DWPA violates the Contracts Clause.

permanently enjoin the defendants from enforcing the DWPA.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

July 11th, 1994

APPENDIX C

[Filed Jul. 11, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1127

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

For the reasons expressed in the Court's Revised Memorandum Opinion, it is this 11th day of July, 1994, hereby

ORDERED that the plaintiffs' motion for summary judgment is GRANTED and the defendants' motion to dismiss and the intervenors' motion for summary judgment are DENIED; and it is further

ORDERED that the Displaced Workers Protection Act of 1994, D.C. Code §§ 36-1501 *et seq.*, is declared to be preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and therefore invalid and unenforceable; and it is further

ORDERED that the defendants, their officers, agents, employees, attorneys, and all other persons in active participation with them are permanently enjoined from enforcing the Displaced Workers Protection Act of 1994; and it is further

ORDERED that this case is DISMISSED.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

APPENDIX D

[Filed Aug. 9, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7143

WASHINGTON SERVICE CONTRACTORS COALITION,
an unincorporated association, *et al.*,
Appellees,

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellants

and Consolidated Case No. 94-7144

BEFORE: Wald, Sentelle and Rogers, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed June 12, 1995, and of the response thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

MARK J. LANGE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle would grant the Petition for rehearing.

Supreme Court, U.S.
FILED
JAN 22 1996

No. 95-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Petitioners,
v.
DISTRICT OF COLUMBIA, *et al.*,
and
SERVICE EMPLOYEES INTERNATIONAL UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-896

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *et al.*,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

The decisions below, statutes involved and basis for jurisdiction are accurately stated in the Petition for Writ of Certiorari (at 1-2).

STATEMENT OF THE CASE

A. *The Statute:* The basic premise of the Petition for Writ of Certiorari is that the District of Columbia Displaced Worker Protection Act of 1994 ("DWPA"), D.C. Code Sections 36-1501 to 1503, "imposes on employers an obligation to bargain with the labor union that represented the predecessor's employees." Petition for a Writ of Certiorari (Pet.) at 3. The DWPA does no such thing.

The DWPA applies without regard to whether the covered employees are union represented or not, and alleviates the impact of contract turnover on low wage workers

employed in certain contract service industries such as janitorial and food services, and on the District's social services and unemployment compensation budgets, by providing these low-skilled workers a limited opportunity for continued employment.

Hearings held by the D.C. City Council before enacting the DWPA revealed that because of the labor intensive nature and low capital requirements of these service industries contracts frequently turn over, and that when a service contractor loses a contract its workers generally lose their jobs with that employer. Appendix filed in the Court of Appeals ("App."), at 81, 120. This continuous turnover has a great impact on the District's unemployment compensation system. The District's Department of Employment Services stated during the statute's consideration that the DWPA, if enacted, "could significantly impact the reduction of the number of unemployed D.C. residents currently collecting unemployment benefits in the job categories covered by the bill." App. at 80-83.

The DWPA provides that, when a covered employer is awarded a contract to perform "similar covered services" previously provided by another contractor, the covered employer must retain covered employees of its predecessor "for a 90-day transition employment period". D.C. Code §§ 36-1503(b). The new contractor may establish its own terms of employment, *see*, D.C. Code §§ 36-1502, and is specifically authorized "at anytime, [to] determine[] that fewer employees are required to perform the new contract than were required by the previous contractor." D.C. Code §§ 36-1502(c).

The statute explicitly allows discharge for cause during the transition period. D.C. Code §§ 36-1502(e). Further, when the transition period ends, the contractor is required only to do a performance evaluation to determine if the employee has performed satisfactorily and should continue to be retained. D.C. Code §§ 36-1502(f). Persons employed in managerial and other positions exempted from coverage under the Fair Labor Standards

Act, 29 U.S.C. § 213(a)(1), are specifically excluded from coverage under DWPA. *Id.*

B. *Proceedings:* Less than one month after the DWPA took effect, Petitioners, an association of building service contractors and some individual contractors ("the contractors"), filed suit against the District of Columbia ("District") in federal District Court. The district court enjoined the DWPA as preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., for two separate reasons: First, insofar as the DWPA applies to supervisors, "the DWPA's application to supervisors [was] enjoined" as violative of NLRA § 14(a), 29 U.S.C. § 164(a)," Pet. App. 30a-31a; and second, the DWPA "as a whole" was declared preempted as "an unprecedented incursion into an area that was previously unregulated." Pet. App. 38a.

The District and the Intervenor Union appealed the district court's broad ruling that the DWPA as a whole is preempted, but did not appeal the first, narrower aspect of the judgment, pertaining only to supervisors.[1] On appeal, the Court of Appeals for the D.C. Circuit reversed.

Unanimously, the court below rejected the contractors' contention that the district court's injunction must be sustained in its entirety on the basis of that court's ruling concerning supervisors. Pet. App. 6a-7a; Pet. App. 14a. The court of appeals also rejected, 2-1, the district court's broad NLRA preemption ruling. The majority explained

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[1] The District and the Unions noted that, in their view, the DWPA would apply to few if any NLRA supervisors, and would not require that those individuals be hired as supervisors or protect supervisors from discharge because of their union affiliation. Because the DWPA therefore accords minimal protection to supervisors and is instead intended to protect rank-and-file employees, the present respondents determined that it would simplify the further consideration of this case to accept the district court's ruling with respect to NLRA "supervisors" only. Brief for Appellants, at 7-8.

that the contractors' preemption contention, based principally upon the possibility that, where the predecessor employer's workforce is represented by a union for purposes of collective bargaining the successor will be obliged under the NLRA to recognize that union and bargain with it, "contains a logical flaw" (Pet. App. 9a):

> [W]here the employer has been required by local law to hire a majority of its predecessor's employees, the NLRB may or may not impose successorship obligations on the new employer. We will not know until the NLRB addresses the issue. At that time, if the NLRB determines that the successorship doctrine does not apply, appellees' alleged "conflict" will disappear. On the other hand, if the NLRB—the body to who Congress has entrusted the evolution of federal labor policy [citation omitted]—determines that the successorship doctrine should apply to such circumstances, it is difficult to see how appellees could argue that the result would invoke 'conflict' between the DWPA and the NLRA. [Pet. App. 9a.]

And the Court of Appeals, in reliance on *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), held that the NLRA does not broadly preempt state laws concerning hiring decisions generally, any more than it does other state employee protective legislation. Pet. App. 10a-11a. Finally, the D.C. Circuit rejected the contention that the DWPA is invalid under the Contracts Clause. Pet. App. 12a. Judge Sentelle dissented as to the broad NLRA preemption argument only. Pet. App. 14a-16a.

ARGUMENT

The preemption issue decided by the Court of Appeals in this case is, by petitioners' own admission, *sui generis* and on that basis alone is uncertworthy. Pet. 6 ("no state or local jurisdiction has ever passed a law like the DWPA); Pet. 24 ("the DWPA is unique").[2] This

[2] We do not know of any *state* statutes similar to the DWPA. (There are, however, various federal statutes that provide hiring

Court does not sit to correct error in a case which has no impact at all beyond the borders of the District of Columbia.

Beyond that—if more be needed—the Court of Appeals' rejection of petitioners' NLRA successorship law preemption argument rests primarily on the unexceptionable grounds that petitioner's argument is marred by a fundamental "logical flaw," and that petitioner's argument is in addition squarely refuted by this Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts, supra.* And, the Court of Appeals' timeliness ruling—that it is premature to consider petitioner's substantive contention concerning whether the NLRA permits imposition of a bargaining obligation on a successor employer absent a conscious decision by that employer to hire a majority of its predecessor's employees—likewise raises no legal question of substance for this Court. Finally, petitioners' severability and Contract Clause arguments are, as the Court of Appeals indicated, entirely without basis.

1. The Petition at pp. 7-9 would have it that the DWPA by its terms creates labor law "successors," required to bargain with any union representing their predecessor's employees. The DWPA, however, does *not* itself impose any bargaining obligation. Rather the DWPA applies across the board, where the predecessor was organized or where the predecessor was unorganized, and simply establishes "minimum labor standards [that] affect union and nonunion employees equally." *Metro-*

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protection for employes. *See* p. 9, *infra.*) Contrary to Petitioners' suggestion (Pet. 6 n. 3), *Cannon v. Edgar*, 33 F. 3d 880 (7th Cir. 1994) involved a state statute bearing no resemblance to the DWPA. That statute required that employers and unions in certain circumstances designate which employees would work in the event of a strike. The Seventh Circuit held that statute preempted not because of any interference with a supposed employer "freedom to hire", but because that statute is inconsistent with federal labor law principles protecting the right to strike and precluding imposition of the terms of a collective bargaining agreement.

politan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985), *quoting Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).

Equally to the point, the NLRA does not in terms address the circumstances under which a successor employer must bargain with the union that represented the employees of its predecessor. Instead, NLRA successorship doctrine has evolved over time through NLRB and court decisions on how the NLRA system for determining questions of representation is affected by changes in the employing entity. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-41 (1986). The most that can be said with any certainty regarding that doctrine is that generally an employer who hires as a majority of its workforce the predecessor's employees is obliged to bargain collectively with the union, if any, representing its predecessor's employees. *Fall River*, 482 U.S. at 46.

The salient point here, however, is that *no* Board or court case has addressed the question whether the same result would follow if the successor hired its predecessor's employees because the successor was obliged by law to do so, rather than because it voluntarily chose to do so.

Petitioners would fill this void with the prediction that when that issue is reached, the Board and the courts will conclude that employers covered by the DWPA will incur a bargaining obligation because of the mandatory retention of the predecessor's employees. At the same time, the contractors maintain that imposing such an obligation will be inconsistent with the NLRA because the NLRA successorship doctrine permits impostion of bargaining obligations only where the employer has made a "conscious decision . . . to hire a majority of its employees from the precedessor." Pet. 13, quoting, *Fall River Dyeing*, 482 U.S. at 41, Pet. 13.

As the court below recognized, this argument is on its face a mass of internal contradictions. If the second part of the argument is correct—if, as the contractors in this

case insist, the NLRA affirmatively protects successor employers' free market right of self-determination in hiring—then the NLRB and the courts will *not* require employers to bargain collectively where they did not voluntarily undertake to hire a majority of the intact workforce.[3] The contractors' confident prediction that they will be treated as NLRA successors if the DWPA remains in place and their insistence that such treatment would be inconsistent with the premises of the NLRA successorship doctrine cannot both be true.[4] And, since the DWPA

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[3] We hasten to add that we do not believe that the successor doctrine *does* rest on any "right" of employers to make a conscious choice to hire their predecessors employees. For present purposes, however, the issue is not whether or not the contractors are correct in that premise, but whether the courts should decide the question in the present preemption context rather than on appeal from an NLRB decision.

[4] Petitioners' two responses to the foregoing are perfunctory. First, the contractors maintain that leaving the question of the impact of the DWPA on the bargaining obligations of successor employees to the NLRB could, if the Board agrees with petitioners' *own arguments* concerning the central role of voluntary employer hiring decisions in the successorship doctrine, result in a "harmful impact . . . on *employees'* rights: the employees would be deprived of their chosen collective bargaining representative, a result inimical to federal labor policy." Pet. 14. But, again, if the NLRB and the courts reached that conclusion, it would be on the basis that the result is *not* one "inimical to federal labor policy."

Second, the contractors suggest that the DWPA is preempted, without more, because in any ensuing NLRA successorship litigation involving a DWPA-covered employer, the NLRB may have to take the impact of the DWPA into account in determining the appropriate balance between employee representation and employer autonomy in a successorship situation. But state law often forms the "backdrop" against which federal NLRA rights operate (*Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987, *quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985)). Where state law protects employees or employers without regard to the existence of a labor dispute or the existence or nonexistence of union representation in a workplace, the fact that such rules may have some impact upon how the NLRA regime operates has never been a basis, standing alone, for inferring a

does not itself impose any bargaining obligation, the Court of Appeals quite properly declined to decide the undecided NLRA issue prematurely, or broadly to invalidate the DWPA in order to assure that no bargaining obligation inconsistent with the NLRA is later imposed. Rather, as the court below recognized, the appropriate forum for determining in the first instance which of the two possible views regarding the interaction of the DWPA and the NLRA is most consistent with NLRA successorship principles is the forum prescribed for enforcement of the NLRA, the NLRB.

2. Petitioners' second contention is that the DWPA compromises an NLRA-protected "hiring freedom" of employers. Pet. 17. Although no such employer "right" (*id.*) appears on the face of the statute, petitioners maintain that under the *Machinists* preemption doctrine (*Machinists v. Wisconsin Employment Relations Board*, 427 U.S. 132 (1975)), the fact that Congress in enacting the NLRA regulated the hiring process to the degree of prohibiting discrimination based on union-related activity (§ 8(a)(3), 29 U.S.C. § 158(a)(3)) demonstrates an affirmative Congressional intention that other aspects of the hiring process be left to employer prerogative.

As the court below held, however, the DWPA is simply a variant of state employee-protective legislation and as such, under *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, is not preempted by the NLRA. Pet. App.

Congressional intention to override those rules. *Belknap v. Hale*, 463 U.S. 491, 501 (1983) (recognizing that the availability of a valid state law cause of action for breach of contract by striker replacements might require the Board to adjust the balance otherwise appropriate between the right of strikers to return to work after a strike and the ability of employers to function during a strike); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987) (holding a state severance pay statute valid despite the recognition that the statute could alter the balance of power in bargainng by "undercut[ting] an employer's ability to withstand a union's demand for severance pay."

10a-11a. In both *Metropolitan life, supra,* and *Fort Halifax, supra,* the employer argued, based on *Machinists,* that a state law requiring the payment of certain benefits was invalid because the law restricted the freedom of the parties to collective bargaining agreements to bargain freely with respect to such benefits. 482 U.S. at 20. In both instances, this Court concluded that the NLRA "is concerned primarily with establishing an equitable process for determining terms and conditions of employment," and addresses evils "entirely unrelated to local or federal regulation establishing minimum terms of employment." *Metropolitan Life,* 471 U.S. at 753, 754; *see also Ft. Halifax,* 482 U.S. at 20. For that reason, given the traditional "broad [state] authority under their police powers to protect workers within the State" (*De Canas v. Bica,* 424 U.S. 351, 356 (1976), *quoted in Metropolitan Life,* 471 U.S. at 756), this Court concluded that the NLRA collective bargaining system is intended to operate in tandem with that authority rather than to displace it in favor of an entirely free, unregulated labor market. *Fort Halifax,* 482 U.S. at 21.

The DWPA takes a novel approach to the problem of job security. But, both the mandated health benefits provisions involved in *Metropolitan Life* and the mandated severance benefit provision in *Fort Halifax* were innovative as well.[5] And, nothing in the Court's reasoning in

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[5] While we are not aware of any state laws that mandate continuity of employment over a change of employer, federal laws do so provide, and have never been thought inconsistent with federal labor policy. *Alaska Airlines v. Brock,* 480 U.S. 678 (1987) (upholding, against a challenge based on inseverability from a legislative veto provision, a provision in the Airline Deregulation Act of 1978 providing that covered carriers have a "duty to hire" employees furloughed by other covered carriers within ten years of the enactment of the statute); *see also, e.g.,* Bus Regulatory Reform Act of 1982, § 27; Interstate Commerce Act, 49 U.S.C. § 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. § 907; Regional Rail Reorganization Act of 1978, 45 U.S.C. § 588(f), 7975; Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C.

those cases suggests that the NLRA froze the states' authority to redress employment-connected harms to individual employees as of some time in the past.

To be sure, petitioners claim that hiring issues differ in some fundamental respect from aspects of the employment relationship such as the working conditions involved in *Metropolitan Life* and *Fort Halifax*. There is no legally pertinent difference, however, "based on the language, structure and history of the NLRA . . ." (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989)). The NLRA does not regulate hiring any more or less than the Act regulates discharge, layoff, pay, hours, safety, or any of the other of a myriad of employment-related matters that do not involve the process of bargaining or determination of labor disputes. The *only* NLRA provision relating directly to hiring, § 8(a)(3) 29 U.S.C § 158(a)(3), *also* forbids union-based discrimination in discharge and working condition.[6]

Thus, petitioners' argument that "the antidiscrimination provisions of the NLRA are unintelligible unless one assumes that employers retain the right to make merit-based selection" (Pet. 19) cannot be squared with *Metropolitan Life* itself. Further, there are a panoply of state and federal laws that did not exist when the NLRA was enacted in 1935, and that regulate the employment selection and retention process (such as wrongful termination, employment discrimination and licensing laws), none of which have been thought inconsistent with the NLRA.

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§ 1004; Redwood National Park Expansion Act, 16 U.S.C. § 791; Urban Mass Transportation Act, 49 U.S.C. § 1609(c); Executive Order No. 12966 (1994). That Congress has repeatedly enacted such hiring protections for laid-off employees indicates that the Legislature see no fundamental incompatibility between such requirements and the National Labor Relations Act. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 755.

[6] Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

To fill this glaring statutory gap, petitioners rely upon language in several of this Court's NLRA cases, including one successorship case, which refer to the "right" of employers to choose their employees. Pet. at 18-19. In the cases cited however, as well as others expressing similar concepts, it is always apparent in context that the Court intended only to describe the limited reach of the NLRA itself, not to confer a federally *protected* right in employers to free rein in the hiring process that preempts state law to the contrary. *See e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 40 ("the successor is under no obligation to hire the employees of its predecessor"); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280 n.5 (1972) ("the Board has never held that [the NLRA] itself requires that an employer who submits the winning bid for a service contract . . . be obligated to hire all of the employees of the predecessor."); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 264 (1974) (quoting the above language of *Burns*); *id.* at 262, 264 (using the term "right" when making the same point about the limited nature of the *federal* regulation of the hiring process contained in the NLRA.). Under these cases, employers have, with respect to hiring as with respect to other employee-protective regulation, only the "right" to be free of regulation *by the NLRB*, except insofar as section 8(a)(3) (or any other specific provision of the statute) applies, not the "right" to enjoy a wide, federally-assured "no-law" area of absolute freedom.

Finally, *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) (Pet. 22-23), certainly creates no circuit conflict with regard to the Court of Appeals' *Metropolitan Life* holding in this case. The statute involved in *Chamber of Commerce* bears no resemblance whatever to the DWPA (which, as noted (p. 4, *supra*), the Petition concedes is unique). The *Chamber of Commerce* statute did *not* concern any neutral, across-the-board hiring limitation, but rather concerned a statute

that interfered in the bargaining process directly, by imposing upon the parties to collective bargaining negotiations varying wage and benefit provisions "developed by averaging the bargains struck by other employers and employees." 64 F.3d at 503. Here, the statute has no possible impact whatever on the strategy or outcome of negotiations. *See* n. 4, *supra*.[7]

3. *Petitioners' Other Arguments*: (a) The contractors maintain that even if the Court of Appeals was otherwise correct, the judgment below should be reversed because the DWPA cannot be deemed invalid "to the extent that the DWPA requires employers to retain supervisors in supervisory positions without voiding the entire statute." Pet. App. 30a; Pet. 24-26. No reason is suggested why certiorari should be granted to review this case-specific issue, and none exists.

The argument is, in any event, "inexplicabl[e]" and "meritless." Pet. App. 14a (Sentelle, J., dissenting). Under well-established principles, courts "refrain from invalidating more of a statute than is necessary." *Alaska Airlines, Inc. v. Brock, supra*, 480 U.S. at 684. "Unless it is evident that the Legislature would not have enacted those provisions that are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 101, 108-109 (1976); *Immigration & Naturalization Service v. Chadha*, 463 U.S. 919, 931-932

[7] As the Court of Appeals noted (Pet. App. 9a-10a), employers, whether successors or otherwise, are *prohibited* by the NLRA from avoiding unionization through the tactic of stacking the workforce against the union. 29 U.S.C. § 158(a)(3); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Systems Management, Inc.*, 292 NLRB 1075 (1975); *Shortway Suburban Lines*, 286 NLRB 323 (1987); *Love's Barbeque*, 245 NLRB 78 (1979). Thus, the NLRA does not preserve from interference any employer right of self-help with respect to avoiding a successor's obligation to bargain collectively that parallels the freedom from regulation once bargaining begins at issue in *Chamber of Commerce*.

(1983); *Gray v. United States*, 499 A.2d 815, 821-830 (D.C. 1985).[8]

The District of Columbia has made its legislative intent clear with respect to preserving statutes by enacting a generic severability law, codified as D.C. Code § 49-601:

> (a) [I]f any provision of any act of the Council of the District of Columbia or the application thereof to any person or circumstance is held to be unconstitutional or beyond the statutory authority of the Council . . . or otherwise invalid, the declaration of invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application. . . .

See RDP Development Corp. v. District of Columbia, 645 A.2d 1078, 1082 n.18 (D.C. 1994) (applying the generic severance provision.). There is no doubt that the DWPA can be given meaningful effect without any application to supervisors. As noted (p. 3, *supra*), the very reason respondent did not apepal the supervisor holding is that the district court's supervisor holding af-

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[8] Petitioners suggest that *United States v. National Treasury Employees Union (NTEU)*, 115 S. Ct. 1003 (1995), changed the law of severability so as to broadly preclude partial invalidation of a statute as applied to particular circumstances. Pet. 25-26. In *NTEU*, however, the statute was declared invalid as to a "vast majority" of speech covered by the statute (115 S. Ct. at 1015), while here the statute remains fully valid with regard to almost all the covered individuals. Further, in *NTEU*, unlike here, there was no applicable severance clause (*id.* at 1024 (O'Connor, J., concurring in the judgment and dissenting in part)); there were "inconsistent signals" from Congress concerning its likely intent should the statute be partially invalid (*id.* at 1019 n.26); and there was no "relatively simple" line between valid and invalid applications. *Id. NTEU* therefore establishes only that in some circumstances, none of which exist here, courts may find it necessary as a practical matter to invalidate a statute more broadly than the basis for invalidity itself justifies.

fects the application of the statute either minimally or not at all.[9]

(b) The contractors also assert that the Court of Appeals erred in rejecting their contention that the DWPA violates the constitutional prohibition on impairment of the obligation of contracts. As the Court of Appeals recognized, however, that clause only applies where there is an *existing* contractual relationship to be "impaired", and "the DWPA only requires contractors to *hire* their predecessors employees, not to *fire* their own employees." Nothing in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) or any other case supports the contractors' assertion that "laws . . . *creating* contractual obligations are just as violative of the Contracts Clause as those that diminish or eliminate contractual obligations." Pet. 28 (emphasis supplied).

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[9] The contractors suggest that a state legal rule exempting NLRA supervisors from a provision covering employees cannot be given effect because only the NLRB can determine whether individuals are or are not supervisors within the meaning of the NLRA (Pet. 25 n.12). The Court of Appeals properly held, however, that the rule of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), precluding state adjudication where the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably committed to NLRB adjudication as protected or prohibited by the NLRA, has no application here. Indeed, NLRA § 14(a), the provision assertedly violated by the application of the DWPA to NLRA-defined supervisors, is not enforceable by the NLRB, because it creates no unfair labor practice, and therefore *must* be adjudicable in court.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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